# DOCKET

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o. 83-1274-ASX
Status: GRANTED

Title: Metropolitan Life Insurance Company, et al., Appellants
v.
W. G. Ward, Jr., et al.

Docketed:
February 1, 1984

Court: Supreme Court of Alabama

Counsel for appellant: Zinn, Matthew J., Lister, Charles

Counsel for appellee: Lightfoot, Warren B., Bradford Jr., Robert M.

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 9 1983 | | Application for extension of time to docket appeal and order granting same until February 8, 1984 (Powell, December 12, 1983). |
| 2 | Feb 1 1984 | 3 | Statement as to jurisdiction filed. |
| 3 | Feb 3 1984 | | Appendix of appellants Metro. Life Ins., et al. filed. |
| 5 | Feb 13 1984 | | Order extending time to file response to jurisdictional statement until March 26, 1984. |
| 6 | Feb 21 1984 | | This extension of time applies to all appellees. |
| 9 | Mar 26 1984 | | Motion of appellees Am. Educ. Life Ins., et al. to dismiss or affirm filed. |
| 10 | Mar 26 1984 | | Motion of appellee W. G. Ward, Jr. to dismiss or affirm filed. |
| 11 | Mar 28 1984 | | DISTRIBUTED. April 13, 1984 |
| 12 | Apr 2 1984 | X | Reply brief of appellants Metro. Life Ins., et al. filed. |
| 13 | Apr 16 1984 | | PROBABLE JURISDICTION NOTED. |
| | | | ********** |
| 17 | May 17 1984 | | Order extending time to file brief of appellant on the merits until June 20, 1984. |
| 19 | May 17 1984 | | Order extending time to file brief of appellee on the merits until August 15, 1984. |
| 20 | Jun 20 1984 | | Brief amicus curiae of CT, RI, MA and NH filed. |
| 21 | Jun 20 1984 | | Brief amicus curiae of Life Insurance Council of NY filed. |
| 22 | Jun 20 1984 | | Brief of appellants Metro. Life Ins., et al. filed. |
| 23 | Jun 20 1984 | | Joint appendix filed. |
| 24 | Jun 20 1984 | | Lodging received. |
| 25 | Jun 29 1984 | | Record filed. |
| 26 | Jun 29 1984 | | Certified copy of original record, 9 volumes, received. |
| 27 | Aug 15 1984 | | Brief amicus curiae of FL Association of Domestic Insurance Companies filed. |
| 28 | Aug 15 1984 | | Brief of appellees American Educators Life Ins., et al. filed. |
| 29 | Aug 15 1984 | | Brief of appellee W. G. Ward, Jr. filed. |
| 30 | Aug 15 1984 | | Brief amicus curiae of Alaska, et al. filed. |
| 31 | Aug 15 1984 | | Brief amicus curiae of Allstate Insurance Company, et al. filed. |
| 32 | Aug 15 1984 | | Brief amicus curiae of Illinois filed. |
| 33 | Aug 21 1984 | | CIRCULATED. |
| 34 | Aug 22 1984 | D | Motion of appellee Ward for leave to file out-of-time motion for divided argument filed. |
| 35 | Aug 28 1984 | | SET FOR ARGUMENT. Wednesday, October 31, 1984. (3rd case) |

o. 83-1274-ASF

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 36 | Oct 1 1984 | | Motion of appellee Ward for leave to file out-of-time motion for divided argument DENIED. |
| 37 | Oct 5 1984 | X | Reply brief of appellants Petro. Life Ins., et al. filed. |
| 38 | Oct 31 1984 | | ARGUED. |

# JURISDICTIONAL

# STATEMENT

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# 83-1274

No. ——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
*Appellants,*

*v.*

W. G. WARD, JR., *et al.*,
*Appellees.*

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**On Appeal from the Supreme Court of Alabama**

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## JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED

Whether Alabama's domestic preference tax statute, under which Alabama insurance companies are taxed at a lower rate than out-of-state companies, is valid under the Equal Protection Clause of the Fourteenth Amendment.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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No. ———

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METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
*Appellants,*

v.

W. G. WARD, JR., *et al.*,
*Appellees.*

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**On Appeal from the Supreme Court of Alabama**

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## JURISDICTIONAL STATEMENT

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Appellants Metropolitan Life Insurance Company, *et al.*, appeal from the final judgment of the Supreme Court of Alabama, dated November 10, 1983, holding that the Alabama domestic preference tax statute, Ala. Code § 27-4-4 (1975), does not violate the Fourteenth Amendment to the Constitution of the United States.*

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* A list of the parties below appears in the Appendix (App.) at 67a. Pursuant to Rule 28.1 of the Rules of this Court, the corporate parents, subsidiaries and affiliates of the appellants were listed in Attachment A to the Application for an Extension of Time within which to Docket an Appeal from the Supreme Court of Alabama, No. A-448, which was filed on December 9, 1983. That list should be amended by deleting Ponderosa Homes from the list of partially-owned subsidiaries or affiliates of the Aetna Casualty and Surety Company.

## OPINIONS BELOW

The judgment of the Supreme Court of Alabama on rehearing, which is not reported, appears in the Appendix at 1a. The opinion of the Court of Civil Appeals of Alabama, which is also unreported, appears in the Appendix at 4a. The unreported opinion of the Circuit Court for Montgomery County, Alabama appears in the Appendix at 13a.

## JURISDICTION

The Supreme Court of Alabama denied petitions for a writ of certiorari to review the decision of the Court of Civil Appeals of Alabama on September 23, 1983. On November 10, 1983, the Supreme Court of Alabama granted rehearing, granted the writ of certiorari, and entered a final judgment upholding the constitutionality of the Alabama domestic preference tax statute as applied to appellants.

A notice of appeal to this Court was duly filed in the Supreme Court of Alabama on December 8, 1983. This appeal is being docketed within 90 days of the judgment on rehearing below, pursuant to an order entered by Justice Powell on December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

## CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and of the Alabama Code are set forth in the Appendix at 29a to 37a.

## STATEMENT

Since 1955, the State of Alabama has granted a preference to domestic insurance companies by imposing a substantially lower gross premiums tax rate on Alabama companies than on out-of-state (foreign) companies.[1]

[1] For domestic preference tax purposes, Alabama defines "foreign" insurers as being those companies which either (1) are incorporated in another state, or (2) have their principal office or chief place of business outside the state. Ala. Code § 27-4-1(2) (1975). This definition, which is widely used, *see Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 99 Cal. App. 3d 410, 413 n.1, 159 Cal. Rptr. 889, 841 n.1 (1979), *aff'd*, 451 U.S. 648 (1981), is apparently designed to prevent out-of-state insurance companies from avoiding the domestic preference tax simply by incorporating a paper subsidiary in Alabama.



Under the present version of the domestic preference tax statute, foreign life insurance companies pay a gross premiums tax rate of three percent. Foreign companies selling other forms of insurance, such as property and casualty insurance, pay four percent. Ala. Code § 27-4-4 (a) (1975). Domestic companies, by contrast, pay a rate of only one percent on all forms of insurance premiums. *Id.* § 27-4-5(a).[2] As a result, a foreign company doing the same type and volume of business in Alabama as a domestic company will generally pay three to four times as much in gross premiums tax as its domestic competitor.

The domestic preference tax statute does provide that foreign companies may reduce the discriminatory differential by investing prescribed percentages of their total worldwide assets in specified investments in the State of Alabama. For example, by investing ten percent or more of its total admitted assets in statutorily prescribed Alabama investments, a foreign life insurer can reduce its gross premiums tax rate from three percent to two percent. Similarly, a foreign property/casualty insurer can reduce its tax rate from four percent to three percent by investing ten percent or more of its admitted assets in Alabama investments. Lesser tax reductions are possible based on lesser percentages of investment, with each one percent of worldwide admitted assets invested in Alabama

[2] There are two exceptions to the general rules stated in the text. One is for annuity considerations, on which the tax rate is one percent for both foreign and domestic companies. *Id.* The second is for wet marine and transportation insurance, which is also taxed in a nondiscriminatory fashion. *Id.* § 27-4-6.

yielding a reduction of one-tenth of one percent in the tax rate. *Id.* § 27-4-4(b).

Regardless of the amount invested in the state, however, foreign life insurance companies can never pay a gross premiums tax rate of less than two percent, and other foreign insurance companies can never pay a tax rate of less than three percent. By contrast, domestic companies are automatically entitled to a tax rate of one percent, even if they have virtually no investments in the state. In other words, the investment provision only permits foreign companies to reduce—but never eliminate—the discrimination inherent in the domestic preference tax statute.[8]

In May 1981, this Court opened the way for a constitutional challenge to domestic preference taxes such as Alabama's by repudiating the so-called "privilege tax" doctrine of *Lincoln National Life Insurance Co. v. Read*, 325 U.S. 673 (1945), which had theretofore shielded such laws from scrutiny under the Equal Protection Clause. *See Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 667 (1981). Appellants, which are all insurance companies incorporated outside the State of Alabama, filed claims with the Alabama Department of Insurance in 1981, contending that the Alabama domestic preference tax statute was unconstitutional as applied to them. Appellants sought refunds of more than $32.5 million in domestic preference taxes paid to Alabama for tax years 1977 through 1980. On July 8, 1981, the Commissioner of Insurance denied all such claims.

[8] Moreover, such reductions as are available require levels of investment that are unrelated to the percentage of a foreign insurer's business done in Alabama. For example, the investment required to lower a foreign company's tax rate by one percentage point is ten percent of the company's total admitted assets, whether the company does most of its business, or only a tiny fraction of its business, in Alabama.



In August 1981, appellants appealed the Commissioner's orders to the Circuit Court for Montgomery County, Alabama, seeking a judgment declaring the domestic preference tax statute unconstitutional and requiring the Commissioner to make appropriate refunds. After intervention by a number of domestic insurance companies, the Circuit Court consolidated the various appeals and, with the consent of the parties, selected two claims as lead cases to be treated as binding on all claimants.[9] Following submission of cross-motions for summary judgment, the trial court ruled on May 17, 1982, that the statute was constitutional. Invoking the equal protection standard articulated by this Court in *Western & Southern*, the court held that the domestic preference tax statute had legitimate state purposes and that the distinction in the statute between foreign and domestic companies was rationally related to those purposes. The court identified the asserted legitimate state purposes as being, "in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute." App. at 20a-21a.[10] Based on the evidence presented, which included affidavits of experts for both sides, the court concluded that "the Alabama legislature could have reasonably believed that the statute's classification would promote the foregoing purposes." App. at 21a.

Following an unsuccessful motion for a new trial, appellants appealed the trial court's decision to the Court of Civil Appeals. On April 27, 1983, the appellate court

[9] Metropolitan Life Insurance Company, a New York corporation, was chosen as representative of the life insurance claimants, and the Prudential Property and Casualty Insurance Company, a New Jersey corporation, represented the non-life claimants.

[10] The court also adverted to the possible existence of "other, additional legitimate state purposes." App. at 21a, but did not specify what these purposes might be.

affirmed the lower court's holding on the legitimate state purpose issue, but remanded the case for an evidentiary hearing on the rational relationship issue, ruling that summary judgment was inappropriate where the evidence below was in conflict. App. at 12a.

Appellants petitioned the Supreme Court of Alabama for certiorari, seeking review of the Court of Civil Appeals' ruling on the legitimate state purpose issue. The State of Alabama and the intervening domestic insurance companies petitioned for review of the remand order. In their pleadings in the Supreme Court of Alabama, appellants waived their right to an evidentiary hearing, and requested a final determination of the legal issues regarding their equal protection challenge to the state tax. On September 23, 1983, the Supreme Court of Alabama denied all the petitions for certiorari, thus leaving it unclear whether its order was intended to be a final judgment or to leave the lower court's remand order standing. Subsequently, to remove any uncertainty regarding the decision of the Alabama Supreme Court, appellants again waived their right to a hearing and joined in a joint motion with all other parties seeking rehearing by that court and entry of a final judgment that would be immediately appealable. This motion was granted on November 10, 1983.

## THE QUESTIONS ARE SUBSTANTIAL

The decision below should be reviewed because it upholds as constitutional a form of discriminatory taxation which this Court has repeatedly condemned over a period of almost 75 years. In a series of five decisions, beginning with *Southern Railway v. Greene*, 216 U.S. 400 (1910), this Court has unequivocally held that state tax measures which discriminate against foreign corporations as a class, based solely on place of residence, are invalid under the Equal Protection Clause.[6] Indeed, had it not been for the

[6] *See WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968); *Reserve Life Ins. Co. v. Bowers*, 380 U.S. 258 (1965) (*per curiam*);



prolonged existence of the "privilege tax" doctrine—under which certain forms of state taxation were shielded from equal protection review—domestic preference tax laws such as Alabama's would undoubtedly have been overturned long ago. In light of this Court's decision in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), which marked the demise of the "privilege tax" doctrine, the decision below cannot be sustained.

The need for review by this Court is underscored by two additional factors. The first is the magnitude of the sums involved, and the significance of domestic preference taxes to insurance companies that attempt to do a nationwide business. In 1982, for example, states with domestic preference tax laws on insurance companies collected more than $1.7 billion in total premiums taxes. Litigation concerning the constitutionality of domestic preference taxes is currently pending in 11 states. Furthermore, at least 22 additional states have discriminatory tax laws which are potentially subject to similar challenges.[7]

The second additional factor highlighting the importance of review in this case is the serious conflict between the decision below and the decisions of other state courts holding domestic preference taxes invalid. *See, e.g., Department of Revenue v. Amrep Corp.*, 358 So.2d 1343 (Fla. 1978); *Mary C. Wheeler School, Inc. v. Board of Assessors*, 368 Mass. 344, 331 N.E.2d 888 (1975); *Mis-*

*Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); *Southern Ry. v. Greene*, 216 U.S. 400 (1910).

[7] For the convenience of the Court, a chart listing the domestic preference states, with citations to their statutes, appears in the Appendix at 69a. In one state, North Dakota, litigation is still pending regarding past tax years, but recently enacted legislation has eliminated the domestic preference for tax years after 1981. *See* N.D. Cent. Code § 26.1-03-17(1). Thus, the number of domestic preference states is currently 22.

*souri Pacific Railroad* v. *Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983); *Gilbert Associates* v. *Commonwealth*, 498 Pa. 514, 447 A.2d 944 (1982); *Metropolitan Life Insurance Co.* v. *Commissioner*, Nos. 31865, 31866 (D. Ct., N.D. May 23, 1983), *app. pending*, Nos. 10150, 10517 (N.D.) (reprinted in Appendix at 38a). Because of the proliferation of litigation over this issue, this conflict is almost certain to persist. Only this Court can resolve the conflict and prevent wasteful and repetitive litigation of this constitutional issue in numerous state courts.

1. (a) Prior to this Court's decision in *Western & Southern*, it had long been held that a state tax imposed on a foreign corporation for the privilege of doing business in the state was not subject to review under the Equal Protection Clause, because such a tax was merely a condition on the foreign corporation's right to enter the state. *See, e.g., Lincoln National Life Insurance Co.* v. *Read*, 325 U.S. 673 (1945); *Philadelphia Fire Association* v. *New York*, 119 U.S. 110 (1886). Since insurance companies are not protected by either the Commerce Clause,[8] or the Privileges and Immunities Clause,[9] the doctrine of *Lincoln National* left foreign insurers essentially defenseless against state domestic preference tax laws, so long as such laws were cast in the form of "privilege taxes."

At the same time, however, this Court had developed a separate line of precedents establishing that, where the Equal Protection Clause *was* applicable—that is, in those situations where the "privilege tax" rationale could not be relied upon—state taxes which discriminated against foreign corporations were *per se* invalid. In *Southern Rail-*

[8] The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), lifted all Commerce Clause restrictions on the taxation and regulation of insurance companies by the states. *See Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. at 654-55.

[9] *See id.* at 656; *Hemphill* v. *Orloff*, 277 U.S. 537, 548-50 (1928) (Privileges and Immunities Clause inapplicable to corporations).



*way* v. *Greene*, 216 U.S. 400 (1910), for example, the Court invalidated an Alabama tax imposed solely on foreign corporations, applying the equal protection test that statutory classifications must bear a "reasonable and just relation" to the purpose for which they are enacted. *Id.* at 417. "We hold," the Court announced, ". . . that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution." *Id.* at 418.

The next case in this line of precedents—*Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494 (1926)—"extended the protections of *Southern Railway* against discriminatory taxation to corporations holding short-term licenses, and to those without substantial permanent property in the State," as this Court noted with approval in *Western & Southern*, 451 U.S. at 664. Although the foreign insurance company plaintiff in *Hanover Fire* had very little fixed investment in the state, and had a mere annual license to do business, 272 U.S. at 508, 509, 514-15, the Court held that, with respect to the imposition of taxes, "the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind." *Id.* at 511.

In *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949), the Court applied the same principle to invalidate an Ohio law that imposed an ad valorem tax on certain accounts receivable of foreign corporations where no similar tax was applied to identical property of Ohio companies. "[W]e have held," the Court observed, "as to taxation of intangibles, that the federal right of a nonresident 'is the right to equal treatment.'" *Id.* at 572 (quoting *Township of Hillsborough* v. *Cromwell*, 326

U.S. 620, 623 (1946)). Since domestic corporations in Ohio were exempt from the tax applied to out-of-state companies, the Court found it "obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner." 337 U.S. at 572.

More recently, the Court in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), reversed an Ohio decision upholding a personal property tax imposed on foreign insurance companies but not on domestics, citing *Wheeling Steel* as the controlling precedent. Similarly, in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), the Court overturned a state tax measure which discriminated against out-of-state nonprofit corporations, stating that "while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, 'the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis.'" *Id.* at 119 (quoting *Wheeling Steel Corp. v. Glander*, 337 U.S. at 571-72).

It was thus the general rule, as of 1981, that a state could not discriminate against foreign corporations as a class in the area of taxation without violating the Equal Protection Clause. The exception to this rule, however, greatly limited its practical significance, since this Court had held in *Lincoln National* that any tax cast in the form of a "privilege tax" on foreign corporations was exempt from equal protection review. In *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), the Court resolved this anomalous situation by abandoning the *Lincoln National* doctrine. "In view of the decisions of this Court both before and after *Lincoln National*," the Court stated, "it is difficult to view that decision as other than an anachronism." *Id.* at 667.



In place of the discarded doctrine of *Lincoln National*, the Court announced that review under the Equal Protection Clause of state tax measures affecting foreign corporations would henceforth be governed by traditional equal protection standards, regardless of the form in which the tax statute was cast. "We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.* at 667-68. The standard for measuring such distinctions, the Court said, should be whether the " 'classification . . . rest[s] on differences pertinent to the subject in respect of which the classification is made.' " *Id.* at 668 (quoting *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 494 (1927)).[10]

Applying this traditional test to domestic preference taxes such as Alabama's, there can be no doubt that

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[10] In *Western & Southern*, the issue was the validity of the California retaliatory tax law, under which the state taxed an Ohio insurer at the rate which Ohio would have applied to a California insurer. This Court held that the retaliatory tax had the legitimate purpose of "promot[ing] . . . domestic industry by deterring barriers to interstate business," 451 U.S. at 671, and that the classification of foreign companies on the basis of the tax laws in effect in their home states was rationally related to that legitimate purpose. *Id.* at 674.

As the Court was careful to point out, "it is clear that the purpose [of retaliation] is not to generate revenue at the expense of out-of-state insurers." *Id.* at 669. Moreover, the retaliatory law did not discriminate against all out-of-state companies as a class, but treated foreign companies from states with tax rates equal to or lower than California's the same as domestic companies. As a result, any implication that *Western & Southern* supports a state's right to impose a pure domestic preference tax is plainly unwarranted.

such taxes are invalid. This Court has repeatedly held them unconstitutional under the Equal Protection Clause over a period of almost 75 years. If domestic preference taxes were justified by any conceivable legitimate state purpose, such a purpose would long ago have been found sufficient to support the taxes this Court has overturned. Yet, except for the "privilege tax" cases, this Court has never sustained a domestic preference tax against an equal protection challenge.

(b) Although this point was pressed vigorously below, the lower courts never discussed or even cited this Court's decisions holding domestic preference taxes invalid. Instead, while the courts below conceded that Alabama's tax discriminates against foreign companies, they advanced several state purposes that were asserted to support the tax. As the Court of Civil Appeals summarized them, these purposes were: "in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute." App. at 8a.[11]

The first purpose, the raising of revenue, plainly is a legitimate goal, but just as plainly has nothing to do with discrimination. Indeed, domestic preference taxes arguably *lower* state revenues, by granting domestic companies a partial exemption from the higher taxes imposed on foreign companies. To the extent that Alabama is seeking the right to raise additional revenue solely at the expense of *other* states' corporations, such a purpose is simply impermissible. *Cf. Western & Southern*, 461 U.S. at 669 ("it is clear that the purpose [of retaliatory taxes] is *not* to generate revenue at the expense of out-of-state insurers") (emphasis added).

[11] The Court of Civil Appeals expressly affirmed the latter two purposes, *see* App. at 9a, leaving it unclear whether revenue raising was considered a separate justification for Alabama's domestic preference tax statute.



The second asserted purpose—encouraging the formation of new insurance companies in Alabama—apparently refers to the state's interest in persuading insurance companies to incorporate or locate in Alabama. It is obvious that this purpose could have been ascribed to each of the domestic preference tax laws this Court has invalidated under the Equal Protection Clause. *See* cases discussed at pp. 8-10 *supra*; *see also Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 426 (1921) (tax measure requiring companies to locate a substantial percentage of their assets in the taxing state in order to obtain tax reductions held invalid).[12] If such a purpose were legitimate, these cases would all necessarily have been decided the other way.

Perhaps the best illustration of the inadequacy of this purpose as a justification for discrimination, however, is this Court's decision in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965). In that case, the State of Ohio argued strenuously that its discriminatory tax on foreign insurance companies was valid under the rational basis test. "It is certainly not unreasonable to conceive," the state's brief contended, "that the Ohio legislature intended, by its substitution of the franchise tax for the personal property tax with respect to domestice insurance companies . . . to encourage the location of insurance companies in Ohio." Brief of Appellee at 9, *Reserve Life Insurance Co. v. Bowers*, No. 96 (October Term, 1964) (reprinted in Appendix at 52a, 59a). Far from accepting this argument as adequate to support

[12] *Compare Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 529 (1959) (Ohio tax favoring *nonresidents* held valid because it "encourage[s] the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy").

Ohio's tax, however, this Court reversed *per curiam* the decision of the Ohio Court of Appeals upholding the tax against equal protection challenge. On that basis alone, it is clear that a tax discriminating against foreign insurance companies as a class cannot be justified solely by a purpose to encourage "the location of insurance companies in [the state]." *Id.*

The third asserted state purpose advanced by the lower courts in this case is "encouraging capital investment by foreign insurance companies in Alabama assets and governmental securities." App. at 8a. This purpose apparently relates to the provision in the domestic preference statute which permits a foreign company to reduce its rate of tax by up to one percentage point by investing a portion (ranging from one to ten percent) of its total assets in specified investments in Alabama. Ala. Code § 27-4-4(b), (c) (1975).

This purpose fails to justify Alabama's tax because the so-called "investment incentive" provision in Alabama's domestic preference tax *never* permits a foreign company to eliminate the discriminatory differential entirely. Even if a foreign company invests *all* of its assets in Alabama, it still pays a substantially higher gross premiums tax than a domestic competitor doing the same type and volume of business. Thus, the discrimination against foreign companies is unrelated to any purpose to encourage investment by out-of-state insurers.

More fundamentally, however, an investment incentive provision such as Alabama's is no less discriminatory in its effects than a domestic preference tax based solely on residence. Domestic companies pay the lowest rate of tax automatically, regardless of their investments in the state. Foreign companies, on the other hand, always pay the highest rate, unless they are able to invest a significant percentage of their total assets in Alabama. As a practical matter, it may not be possible for a foreign company to achieve the required investment percentage.[13] No attempt is made in the Alabama statute to relate the required level of investment to the level of a company's business in the state. Nor is there any provision to prevent an overlap between Alabama's investment requirement and similar provisions in other states. In fact, it is literally impossible for a nationwide insurer to comply with the investment requirements in all the domestic preference states where it may do business.[14]



In short, the "investment incentive" rationale simply does not support Alabama's domestic preference tax statute. Nor is the discriminatory tax justified by any of the other purposes put forward by appellees in their pleadings below. Whether couched in terms of promoting the local economy, or in terms of promoting the fortunes of domestic companies at the expense of foreign ones,

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[13] This Court recognized this problem over 60 years ago, in *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921). There, North Carolina provided an 80 percent reduction in the amount of taxes due from any manufacturer of automobiles that invested at least three-fourths of its assets in state or municipal bonds or taxable property situated in the state. Three out-of-state corporations challenged the law on grounds that it violated the Equal Protection and Commerce Clauses. As this Court analyzed the situation, "[t]he [investment] condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the State; it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another State, some of its products only at a given time being within the state." *Id.* at 426. Accordingly, the Court held, "there is a real discrimination, and an offense against the Fourteenth Amendment." *Id.*

[14] Investment incentive provisions comparable to Alabama's exist in at least seven other states. A company seeking to pay the lowest rate of tax in all those states would be required to invest more than 250 percent of its total assets in those states. *See* Ga. Code Ann. § 33-8-5 (Cum. Supp. 1982); Idaho Code § 41-403 (Cum. Supp. 1983); La. Rev. Stat. Ann. § 22:1068 (West Supp. 1983); N.M. Stat. Ann. § 59-5-1(C) (1978 & Cum. Supp. 1983); Okla. Stat. Ann. tit. 36, § 625 (West 1976); W. Va. Code § 33-3-14f (Supp. 1983); Wyo. Stat. § 26-4-104(a) (1983).

the purposes proffered by the State of Alabama have been rejected by this Court. Accordingly, applying the principle of *stare decisis*, the lower courts plainly should have held that Alabama's domestic preference tax statute violates the Equal Protection Clause of the Fourteenth Amendment.

2. The importance of review by this Court of the decision below is further underscored by the significance of this issue to the insurance industry and by the volume of domestic preference tax litigation now pending. Domestic preference taxes, in one form or another, are imposed on foreign insurance companies in some 32 states. *See* App. at 69a. Altogether, these states collected over $1.7 billion in premiums taxes in 1982 alone. *See* Insurance Information Institute, *Insurance Facts* at 40 (1983-84 ed.). While it is difficult to determine accurately the precise amount of the domestic preference in all of these states, many of them collect the bulk of their insurance taxes from foreign insurers, often at rates several times those charged to domestic companies. As a result, foreign companies doing business in domestic preference states are hampered in their ability to compete, and consumers are denied the benefits of fair and open competition. An even more insidious consequence of such discrimination is that it promotes economic warfare among the states. The legislative history reveals, for example, that Hawaii enacted its heavily discriminatory gross premiums tax for the express purpose of responding to the discrimination practiced in other states.[16]

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[16] When Hawaii first enacted its domestic preference tax in 1953, the Senate Committee on Ways and Means reported:

> The purpose of this bill is to give domestic insurance companies preferential treatment in insurance taxes since practically all foreign insurance companies doing business within their own states receive preferential tax treatment at home.

Stand. Comm. Rep. 558, 1953 Haw. Senate Journal 770.



Review by this Court would not only hasten the demise of this unjust system of discrimination, but would also promote judicial efficiency, by eliminating the need for duplicative litigation of this issue in every state court where it may arise. Already, court cases challenging domestic preference taxes have been initiated in at least 11 states, and administrative claims are pending in at least 14 others. Many of these proceedings involve the appellants in this case. Additional cases are certain to follow. Moreover, at least one state legislature, North Dakota's, has recently eliminated the domestic preference from that state's insurance tax laws.[16] Guidance from this Court would undoubtedly assist other states in bringing their laws into conformity with the Constitution.

3. Review by this Court is also urgently needed to resolve the conflict among the states on this important issue. A number of state courts, following this Court's lead, have held state domestic preference tax laws unconstitutional on equal protection grounds. *See, e.g., Department of Revenue* v. *Amrep Corp.*, 358 So.2d 1343 (Fla. 1978); *Mary C. Wheeler School, Inc.* v. *Board of Assessors*, 368 Mass. 344, 331 N.E.2d 888 (1975); *Cleveland-Cliffs Iron Co.* v. *Department of Revenue*, 329 Mich. 225, 45 N.W.2d 46 (1950); *American Youth Foundation* v. *Township of Benona*, 37 Mich. App. 722, 195 N.W.2d 304 (1972); *Missouri Pacific Railroad* v. *Kirkpatrick*, 632 S.W.2d 128 (Mo. 1982); *Gilbert Associates* v. *Commonwealth*, 498 Pa. 514, 447 A.2d 944 (1982); *Bullock* v. *Farmland Industries, Inc.*, 603 S.W.2d 305 (Tex. Civ. App. 1980); *cf. In re Bacchus Imports, Ltd.*, 65 Hawaii 566, 572-74, 656 P.2d 724, 729-30 (1982) (dictum), *prob. juris. noted*, 103 S. Ct. 3109 (1983).[17] Indeed, a North Dakota stat-

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[16] *See* S.L. 1983, ch. 332, § 9; S.L. 1983, ch. 340, § 2; N.D. Cent. Code § 26.1-03-17(1).

[17] Before the enactment of the Tax Injunction Act, 28 U.S.C. § 1341 (1976), the lower federal courts had also consistently invalidated state domestic preference taxes. *See, e.g., Northwestern*

ute which imposed a 2.5 percent gross premiums tax on foreign insurance companies, while placing a much lighter net income tax on domestic companies, was recently held unconstitutional on equal protection grounds by the District Court for the South Central Judicial District of North Dakota. *Metropolitan Life Insurance Co. v. Commissioner*, Nos. 31865, 31866 (May 23, 1983), *app. pending*, Nos. 10510, 10517 (N.D.) (reprinted in Appendix at 38a). As a result of that decision, the North Dakota legislature promptly repealed its domestic preference tax statute and enacted a new, nondiscriminatory law.[18]

The rationale for these decisions was aptly set forth in *Columbia Gas Transmission Corp. v. Commonwealth*, 468 Pa. 145, 360 A.2d 592 (1976). Addressing a discriminatory excise tax on foreign corporations, the Supreme Court of Pennsylvania concluded, "The Commonwealth has not stated, nor can we discern, any valid reason for the difference in the rates of taxation. Classifications based solely on place of incorporation, without any further justification, cannot stand constitutional scrutiny." *Id.* at 150, 360 A.2d at 595. The court went on to explain that the real motivation for Pennsylvania's unequal tax on foreign and domestic corporations appeared to be local favoritism. "The only basis for the disparate rates of tax imposed on foreign and domestic corporations by the excise taxes is that the Commonwealth apparently succumbed

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*Nat'l Ins. Co. v. Lee*, 49 F.2d 274, 280 (D. Ore.), *aff'd sub nom. Averill v. Northwestern Nat'l Ins. Co.*, 284 U.S. 580 (1931) (per curiam); *Sneed v. Shaffer Oil & Refining Co.*, 35 F.2d 21, 24-25 (8th Cir. 1929).

[18] *See* notes 7 & 16 *supra*. The trial court decision in North Dakota held the state's domestic preference tax law unconstitutional on a prospective basis only. The legislation which eliminated the domestic preference was made retroactive to January 1, 1982. An appeal by North Dakota concerning the validity of its now repealed domestic preference tax statute awaits argument in the Supreme Court of North Dakota, together with a cross appeal relating to the denial of refunds of taxes collected prior to 1982.



to 'the temptation to favor local business over foreign.'" *Id.* at 154-55, 360 A.2d at 597 (quoting Note, 88 U. Pa. L. Rev. 456, 456 (1940)).

The Supreme Judicial Court of Massachusetts sounded a similar theme in analyzing a state law granting a tax exemption to Massachusetts charitable corporations but not to foreign ones. "'Since nonresidents are not represented in the taxing State's Legislative halls,'" the court said, quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975), "'. . . judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State . . . .'" *Mary C. Wheeler School, Inc. v. Board of Assessors*, 368 Mass. at 349, 331 N.E.2d at 891. Although the Massachusetts court recognized that the *Austin* case was decided under the Privileges and Immunities Clause, which does not apply to corporations, it also observed that "the equal protection clause, which does so apply . . . has been used to carry out the same policy in the cases involving corporate taxation." *Id.* at 350 n.4, 331 N.E.2d at 891 n.4.

The decision below is squarely in conflict with this consistent line of cases from other state courts. As such, it threatens not only to confuse the law in this area, but also to encourage other states with domestic preference tax statutes to continue their unconstitutional tax policies. Perhaps worst of all, it is manifestly inequitable that Alabama should be permitted to continue a policy of discrimination against foreign companies when such a practice either is not followed—or has been expressly held unconstitutional—in many of the home states of those same foreign companies. If other state courts choose to follow the decision in Alabama, this inequity will only be magnified.

In summary, this Court long ago established that taxes which discriminate against foreign corporations as a class are invalid under the Equal Protection Clause. Domestic

preference taxes such as Alabama's have survived to the present day only as a legacy of the "privilege tax" doctrine of *Lincoln National*. Given the demise of that doctrine in the *Western & Southern* decision, it is time for the domestic preference tax system to be dismantled. This Court should begin that process by reviewing, and reversing, the judgment below.

## CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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February 1, 1984

# APPENDIX

# APPENDIX

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

## THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

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82-813

EX PARTE: HONORABLE W. G. WARD, JR.,

Petition for Writ of Certiorari
to the Court of Civil Appeals

(RE: METROPOLITAN LIFE INSURANCE COMPANY, *et al.*

v.

W. G. WARD, JR., ETC., *et al.*)

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82-825

EX PARTE: AMERICAN EDUCATORS LIFE
INSURANCE COMPANY, *et al.*

Petition for Writ of Certiorari
to the Court of Civil Appeals

(RE: METROPOLITAN LIFE INSURANCE COMPANY, *et al.*

v.

W. G. WARD, JR., ETC., *et al.*)

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82-851

EX PARTE: METROPOLITAN LIFE INSURANCE COMPANY, *et al.*

Petition for Writ of Certiorari to the Court of Civil Appeals

(RE: METROPOLITAN LIFE INSURANCE COMPANY, *et al.*

v.

W. G. WARD, JR., ETC., *et al.*)

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PER CURIAM.

ON APPLICATION FOR REHEARING

On October 13, 1983, the parties filed a document in this Court styled: "Joint Request for Suspension of the Rules and Joint Stipulation and Motion of the Parties for a Rehearing and Entry of Judgment." In that document, the parties stipulated as follows:

"III. JOINT STIPULATION AND MOTION

"NOW, THEREFORE, the parties hereto do jointly and voluntarily stipulate that there has been a full, complete and knowing waiver, by, for and on behalf of the Foreign Insurers, of any right to an evidentiary hearing or trial on the second, factual issue, to-wit: Whether the Legislature could have reasonably believed that the premium tax statute's use of the classification of insurance companies as foreign and domestic would promote any of the purposes which the lower courts have determined to be legitimate.

"In view of this stipulation and agreement, the parties hereby submit that this Court's orders of



September 23, 1983, should be reviewed and the parties do therefore respectfully move the Court to conduct a rehearing and, upon such rehearing, to enter a final judgment in favor of the State and the Intervenors, denying the Foreign Insurers' equal protection challenge to the Alabama premium tax statute, *Ala. Code* § 27-4-4 *et seq.* (1975), so that the case can go forward to its ultimate conclusion."

We have considered the motion of the parties and are of the opinion that it is due to be granted, that the rules should be suspended, that rehearing should be granted, the writ of certiorari granted, and that a final judgment in favor of the state and the intervenors should be entered, and that the foreign insurers' equal protection challenge to the Alabama premium tax statute should be denied. It is so ordered.

MOTION GRANTED; RULES SUSPENDED; REHEARING GRANTED; WRIT OF CERTIORARI GRANTED; JUDGMENT OF THE COURT OF CIVIL APPEALS MODIFIED; AFFIRMED AS MODIFIED.

Maddox, Faulkner, Jones, Embry, Beatty and Adams, JJ., concur.

Torbert, C. J., and Shores, J., recused.

Almon, J., not sitting.

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1982-1983

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Civ. 3424

METROPOLITAN LIFE INSURANCE CO., *et al.*

v.

THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, *et al.*, *Intervenors*

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Appealed From Montgomery County Circuit Court

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WRIGHT, Presiding Judge

This is a constitutional challenge to the Alabama tax on insurance premiums brought as a result of the recent ruling of the United States Supreme Court in the case of *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed.2d 514 (1981).

Section 27-4-4, Code of Alabama 1975, imposes a premium tax on "foreign insurers" at a rate higher than the rate imposed on "domestic insurers" engaged in the same type of insurance business in this state. Section 27-4-1(2) defines "foreign insurer" as any insurance company not incorporated in Alabama and not having its



principal office or chief place of business in Alabama. The law imposes a tax rate of four percent (4%) on the premiums collected by foreign property and casualty insurers and three percent (3%) on the premiums collected by foreign life insurers. § 27-4-4, Code 1975. In contrast, the tax rate for domestic insurers is one percent (1%) for both life and property-casualty companies. In addition, § 27-4-4(b) provides a progressive deduction from the tax rate for defined capital investments by the foreign insurer in Alabama. Appellants contend that the discriminatory tax rate on foreign insurers is an unconstitutional denial of their fourteenth amendment right to equal protection of the laws.

The appellants in this case are thirty-nine insurance companies, classified as foreign insurers under Alabama law, which have paid their annual premium taxes for each year they have done business in Alabama. In 1981 each foreign insurer paid its premium taxes (where applicable) under protest and filed petitions for refunds for taxes paid for certain open years, alleging that the Alabama discriminatory tax scheme was unconstitutional. The Alabama Commissioner of Insurance denied the petitions, and the foreign insurers filed Notices of Appeal with the Commissioner. Each foreign insurer filed a separate complaint in the Circuit Court of Montgomery County, appealing the Commissioner's decisions and seeking a declaratory judgment as to the constitutionality of the Alabama premium tax classification scheme and a writ of mandamus, or such other remedy as the court deemed appropriate, requiring the Commissioner to refund the premium taxes collected under the statute. The separate cases were consolidated for trial and it was agreed that two cases, those involving Metropolitan Life Insurance Company and the Prudential Property and Casualty Insurance Company, would go to trial and the findings in those cases would control all of the other cases.

Metropolitan paid taxes for the years 1977-80 at the rates imposed on foreign life insurers under the provisions of § 27-4-4, Code 1975. Prudential paid taxes at the rates imposed on foreign property and casualty insurers for 1977. Each claimed and were allowed credit for investments under § 27-4-4(b). Both Metropolitan and Prudential filed timely petitions for refunds of taxes paid, as authorized by § 27-4-11, Code 1975. The petitions were denied by the State on July 8, 1981. Appeal was taken to the circuit court pursuant to § 27-2-32, Code 1975.

Several domestic insurers filed motions in the circuit court to intervene as defendants. The motions were granted. Cross motions for summary judgment were made and heard. On May 17, 1982, the court granted summary judgment to the State. The foreign insurer's motion for a new trial was denied. This appeal followed.

In the circuit court all parties agreed that the case would be governed by the recent Supreme Court decision in *Western and Southern Life Insurance Co. v. State Board of Equalization, supra*. *Western and Southern* did not deal with discriminatory tax rates of the nature involved in this appeal. Instead, it dealt with a retaliatory tax, *i.e.*, a tax which imposes the same rate on foreign insurers that is being assessed against the taxing state's domestic insurers by the foreign insurer's state of domicile, when that rate is greater than the standard rate imposed by the taxing state on foreign insurers. Alabama has such a tax, § 27-3-29, Code of Alabama 1975, but it is not challenged here. The court in *Western and Southern* ruled that the retaliatory tax did not violate equal protection principles.

The first important holding in *Western and Southern* is: (1) the Commerce Clause does not apply to the insurance business under the McCarran-Ferguson Act (15 U.S.C.A. § 1012 (West 1976)); (2) the Privileges and



Immunities Clause does not apply to corporations (*see Hemphill v. Orloff*, 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928)); and therefore (3) only the Equal Protection Clause remains as a restriction upon the states' power to tax the insurance business. 101 S. Ct. at 2977. Thus we shall limit our federal constitutional examination of the Alabama taxing scheme to equal protection arguments.

The second holding of *Western and Southern* was that the case of *Lincoln National Life Insurance Co. v. Read*, 325 U.S. 673, 65 S. Ct. 1220, 89 L. Ed. 1861 (1945) was overruled. That case held that states may impose taxes on foreign corporations for the "privilege" of doing business in the state, even where the tax had no rational or legitimate state purpose other than raising revenue. In overruling *Lincoln National* the court said:

> "In view of the decisions of this Court both before and after *Lincoln National*, it is difficult to view that decision as other than an anachronism. We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."

101 S. Ct. at 2983.

Thus, classification of the Alabama premium tax as a "privilege" tax will not save it from constitutional attack; it must withstand equal protection analysis. That analysis requires that two questions be answered affirmatively. *Vance v. Bradley*, 440 U.S. 93, 97-98, 99 S. Ct. 939, 943, 59 L. Ed. 2d 171 (1979). First, does the discriminatory tax have a legitimate state purpose? Second, was it reasonable for the Alabama legislature to believe

that use of the foreign/domestic classification would promote that purpose? 101 S. Ct. at 2063.

In granting summary judgment for the State, the court found that the tax had at least two legitimate purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama; and (2) encouraging capital investment by foreign insurance companies in Alabama assets and governmental securities. The court also found, based on affidavits of experts in the insurance field presented by both sides, that it was reasonable for the legislature to believe that the statute's classification would promote those purposes. The foreign insurers contend the court erred in both findings and, thus, in the granting of the motion for summary judgment.

On appeal from the summary judgment, "we must determine whether there exists any genuine issue of material fact and, if not, whether the substantive law was correctly applied to undisputed facts." *Watts Construction Co. v. Cullman County*, 392 So. 2d 520, 522 (Ala. 1980). We shall first consider the question of whether the trial court was correct in finding legitimate state purposes for the discriminatory tax.

At the trial, the State presented a list of conceivable legitimate state purposes for its premium tax policy, with supporting affidavits of experts in the field of insurance. The domestic insurers, as defendant/intervenors, presented four additional purposes. The foreign insurers contend that it was error for the trial court to consider these lists, because the legislature specifically stated its purpose. The foreign insurers contend that the only purpose stated by the legislature is found in the last legislative pronouncement dealing with the premium tax before adoption of the 1975 Code of Alabama, *i.e.*, Act of October 1, 1971, No. 2106, 1971 Ala. Acts 3375; that being "to raise revenue." Therefore there is no basis for considering other possible purposes.



The law is clear that the party attacking a statute has the burden of overcoming the presumption of constitutionality and must negate every conceivable or reasonable basis which might support the classification. *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979). "[A] statutory discrimination should not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* citing *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 393 (1961).

The foreign insurers contend that neither of the purposes found by the court are constitutionally legitimate. The constitutional legitimacy of the purpose of suspect legislation, once such purpose is shown must be a question of law. The Supreme Court has said that the location or promotion of a needed or useful industry within the state is a legitimate state purpose, as well as efforts to maintain the profit level of a domestic industry. *See Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 174 (1970).

The foreign insurers argue that promotion of domestic industry is a legitimate state purpose only when it deters barriers to interstate commerce. They claim the Alabama statute is a barrier to interstate commerce, and is therefore unconstitutional. This is a commerce clause argument, and most of the cases cited by the foreign insurers in support thereof are commerce clause cases. *See, e.g., Pike v. Bruce Church, Inc., supra*, and *Parker v. Brown, supra*. However, commerce clause limitations do not apply to the business of insurance. McCarran-Ferguson Act, *supra*. We therefore affirm the trial court's finding of at least two legitimate purposes of the discriminatory tax: (1) encouraging the formation of domestic insurance companies in Alabama; and (2) encouraging capital investment by foreign insurance companies in Alabama.

The foreign insurers also contend that the statute violates the equal protection doctrine of the Alabama Con-

stitution, found in Ala. Const. art. I, §§ 1, 6, 22, and 35. The Alabama Supreme Court has analyzed equal protection under the Alabama Constitution identically to the analysis under the federal constitution in *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981). Considering this case in like manner, we find that the tax on foreign insurance companies does not violate the equal protection doctrine of the Alabama Constitution.

The foreign insurers also contend that the trial court committed reversible error by granting summary judgment on the issue of whether it was reasonable for the legislature to believe that the use of the foreign/domestic classification would promote the legitimate purposes found by the court. They contend that such reasonableness was an issue of material fact placed in dispute by the affidavits of the various experts. The Supreme Court of Alabama has stated the scope of review of appellate courts on appeal from summary judgment in *Ryan v. Charles Townsend Ford, Inc.*, 409 So. 2d 784, 786 (Ala. 1981):

> "It is a long-established rule in this state that on motions for summary judgment, the movant has the burden of negating the existence of any issue of material fact; *Plant v. Reid, Inc.*, 365 So. 2d 305 (Ala. 1978); *Worley v. Worley*, 388 So. 2d 502 (Ala. 1980), and if there is a scintilla of evidence supporting the non-moving party, summary judgment is inappropriate. *Studdard v. South Central Bell Tel. Co.*, 356 So. 2d 139 (Ala. 1978). In determining the existence of genuine issues of material fact, the record must be viewed by this Court in a light most favorable to the non-moving party. *Papastefan v. B & L Const. Co., Inc. of Mobile*, 356 So. 2d 156 (Ala. 1978)."

The burden of proof on the State was indeed great on its motion for summary judgment. If the evidence presented "a mere gleam, glimmer, spark, the least particle, the smallest trace, a scintilla, in support of the theory of



the complaint," *Alabama Power Co. v. Scholz*, 283 Ala. 232, 237, 215 So. 2d 447, 450 (1968), the grant of the motion for summary judgment was improper.

The State's burden of proof on motion for summary judgment is complicated by the foreign insurer's burden of proof in challenging the constitutionality of a statute. When questioning the legislative judgment, the court is "restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S. Ct. 778, 784, 82 L. Ed. 1234 (1938). Thus, if the question is at least debatable, the legislative judgment must be sustained. *Id.* "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 99 S. Ct. 939, 950, 59 L. Ed. 2d 171 (1979). The wisdom of the legislation or whether in fact it will accomplish its purpose is not the question. *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S. Ct. 1028, 1030, 10 L. Ed. 2d 93 (1963). It was apparently on the proposition that the reasonableness of the legislative judgment was shown to be at least debatable that the court granted the State's motion for summary judgment.

Contrasting the burden of proof placed upon the constitutional challengers of a statute to that upon the party moving for a summary judgment results in a conflict of the burdens of proof which is difficult to resolve. It is the opinion of the court that the presumption of constitutionality afforded legislative enactments was not intended to prevent the full factual development of the challenge of the rationality of the action of the legislature in pursuing its stated or conceivable purpose.

The Alabama Supreme Court spoke somewhat to this issue in *Thorn v. Jefferson County*, *supra*. In this case the constitutionality of a statute was also being que-

tioned; the trial court had granted a motion to dismiss. Justice Maddox, writing for the majority, said:

> "In order to sustain the grant of the motion to dismiss, we would have to take judicial notice that the Legislature had a rational basis upon which to base its classification in this statute. This we cannot do. The taxpayers have alleged that the classification is arbitrary and capricious. They have the burden to prove this, but they are at least entitled to have their day in court."

In viewing the record in the light most favorable to the foreign insurers, *Ryan, supra*, we must hold that the trial court erred in denying the foreign insurers the opportunity to fully present their evidence at trial. If such were not permitted, a mere scintilla of evidence causing the issue of reasonableness to be debatable could result in summary judgment for the movant and cut off further testimony. The scintilla rule is to prevent summary judgment, not aid it. There is nothing recorded which discloses that the evidence of the non-moving party in this case is complete. At least the opportunity to present further evidence should not be foreclosed without such disclosure.

We reverse the granting of summary judgment in favor of the State because there is presented an issue of fact on the question of whether the legislature could have rationally believed that enactment of the discriminatory tax would promote the legitimate State purposes. The result of this reversal is that the entire judgment below may be reviewed if deemed necessary by introduction of additional testimony. The trial court, if so inclined, could open the matter for further consideration of conceivable legitimate state purpose.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH DIRECTIONS.

BRADLEY and HOLMES, *JJ.*, Concur.



IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

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Civil Action No. CV-81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,

Civil Action No. CV-81-995-Th

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
a mutual life insurance company—N.J.,

Civil Action No. CV-81-996-Th

THE PRUDENTIAL PROPERTY AND CASUALTY
INSURANCE COMPANY,
a New Jersey corporation,

Civil Action No. CV-81-997-Th

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
a New York corporation,

Civil Action No. CV-81-998-Th

NEW YORK LIFE INSURANCE COMPANY,
a New York corporation,

Civil Action No. CV-81-999-Th

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
a New York corporation,

Civil Action No. CV-81-1000-Th

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
a Massachusetts corporation,

Civil Action No. CV-81-1301-Th

THE PAUL REVERE LIFE INSURANCE COMPANY,
a Massachusetts corporation,

Civil Action No. CV-81-1302-Th

THE PAUL REVERE VARIABLE ANNUITY
INSURANCE COMPANY,
a Massachusetts corporation,

Civil Action No. CV-81-1303-Th

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA,
a Massachusetts corporation,

Civil Action No. CV-81-1304-Th

MASSACHUSETTS BAY INSURANCE COMPANY,
a Massachusetts corporation,

Civil Action No. CV-81-1305-Th

HANOVER INSURANCE COMPANY,
a New Hampshire corporation,

Civil Action No. CV-81-1306-Th

THE TRAVELERS INSURANCE COMPANY (ACCIDENT),
a Connecticut corporation,

Civil Action No. CV-81-1199-Th

THE TRAVELERS INSURANCE COMPANY (LIFE),
a Connecticut corporation,

Civil Action No. CV-81-1308-Th

INDUSTRIAL INDEMNITY COMPANY,
a California corporation,

Civil Action No. CV-81-1309-Th

INTERNATIONAL INSURANCE COMPANY,
an Illinois corporation,



Civil Action No. CV-81-1310-Th

UNITED STATES FIRE INSURANCE COMPANY,
a New York corporation,

Civil Action No. CV-81-1311-Th

THE NORTH RIVER INSURANCE COMPANY,
a New Jersey corporation,

Civil Action No. CV-81-1348-Th

HARTFORD CASUALTY INSURANCE COMPANY,
a New Jersey corporation,

Civil Action No. CV-81-1349-Th

HARTFORD FIRE INSURANCE COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1350-Th

TWIN CITY FIRE INSURANCE COMPANY,
a Minnesota corporation,

Civil Action No. CV-81-1351-Th

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1352-Th

HARTFORD LIFE AND ACCIDENT COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1353-Th

HARTFORD VARIABLE ANNUITY LIFE INSURANCE COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1354-Th

NEW YORK UNDERWRITERS INSURANCE COMPANY,
a New York corporation,

Civil Action No. CV-81-1355-Th

HARTFORD LIFE INSURANCE COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1673-Th

THE TRAVELERS INDEMNITY COMPANY OF AMERICA,
a Georgia corporation,

Civil Action No. CV-81-1674-Th

THE PHOENIX INSURANCE COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1675-Th

THE CHARTER OAK FIRE INSURANCE COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1676-Th

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
a Connecticut corporation,

Civil Action No. CV-81-1677-Th

THE TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND,
a Rhode Island corporation,

Civil Action No. CV-81-1678-Th

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,
a California corporation,

Civil Action No. CV-81-1679-Th

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
a Massachusetts corporation,

Civil Action No. CV-81-1680-Th

THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,



Civil Action No. CV-82-245-Th

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
a Connecticut corporation,

Civil Action No. CV-82-246-Th

AETNA LIFE INSURANCE AND ANNUITY COMPANY,
a Connecticut corporation,

Civil Action No. CV-82-247-Th

THE AETNA CASUALTY AND SURETY COMPANY,
a Connecticut corporation,

Civil Action No. CV-82-248-Th

THE STANDARD FIRE INSURANCE COMPANY,
a Connecticut corporation,

Civil Action No. CV-82-249-Th

AETNA LIFE INSURANCE COMPANY,
a Connecticut corporation,
*Plaintiffs,*

—vs—

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED FIRE INSURANCE COMPANY, an Alabama corporation,
*Intervenors.*

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

This matter is presently before the Court on the motions for summary judgment filed by each of the plaintiffs, the defendant, and the intervenors. The Court has considered the evidence and briefs submitted by the parties with regard to the pending motions.

By consent of the parties, as reflected in this Court's Order of May 5, 1982, the issues and evidence submitted in Civil Action No. 81-994-Th have been considered as if presented in like manner in each of the cases brought by life insurance companies and consolidated herein. Similarly, by consent, it has been agreed that this Court's decision in Civil Action No. 81-994-Th is applicable to and dispositive of each of the cases brought by life insurance companies and consolidated herein.

Likewise, by consent, the issues and evidence submitted in Civil Action No. 81-996-Th have been considered as if presented in like manner in each of the cases brought by property and casualty insurers and consolidated herein. The Court's decision in Civil Action No. 81-996-Th is thus, by consent, applicable to all of said cases brought by property and casualty insurers and consolidated herein.

Plaintiffs in these consolidated actions are a number of foreign insurers who seek to have Alabama's premium tax held unconstitutional. The object of the plaintiffs' attack is the differential premium tax rate imposed on foreign insurers in contrast to the tax imposed on domestic insurers (maintaining their principal places of business in Alabama and organized under the laws of the State of Alabama). The scheme is quite complex and has changed through the years, as the legislature has attempted to adjust the economic effects of the statute. Today, the law imposes a tax of 4% on the premiums collected by foreign property and casualty insurers and 3% on the premiums collected by foreign life insurers.



§ 27-4-4, *Code of Alabama* 1975. The tax on domestic insurers (each of which must, under § 27-4-1, *Code*, maintain its "principal office and chief place of business" in Alabama to gain the law's benefits), in contrast, is 1% for both life and property/casualty companies. § 27-4-5, *Code*. Both groups receive credits against this tax, based upon the payment of other taxes, such as certain *ad valorem* taxes, county license fees and taxes, and franchise taxes. § 27-4-5, *Code*.

Foreign insurers, moreover, can reduce their taxes to 3% and 2%, respectively, by investments in Alabama assets and governmental securities, as follows:

| *Percentage of Insurer's Admitted Assets Invested in Alabama Investments* | *Applicable Rate of Premium Tax for Foreign Life Insurers* | *Applicable Rate of Premium Tax for All Other Foreign Insurers* |
|---|---|---|
| Less than 1% | 3.0% | 4.0% |
| 1% and above but less than 2% | 2.9% | 3.9% |
| 2% and above but less than 3% | 2.8% | 3.8% |
| 3% and above but less than 4% | 2.7% | 3.7% |
| 4% and above but less than 5% | 2.6% | 3.6% |
| 5% and above but less than 6% | 2.5% | 3.5% |
| 6% and above but less than 7% | 2.4% | 3.4% |
| 7% and above but less than 8% | 2.3% | 3.3% |
| 8% and above but less than 9% | 2.2% | 3.2% |
| 9% and above but less than 10% | 2.1% | 3.1% |
| 10% and above | 2.0% | 3.0% |

In addition, the Alabama premium tax law has a "retaliatory" provision. To the extent one of Alabama's domestic insurers is taxed in a foreign state at a rate higher than that state's insurers are taxed in Alabama, that state's insurers are taxed, by Alabama, at such higher rate.

Although plaintiffs allege that this statute is invalid on several bases, the primary question is whether the statute contravenes the Equal Protection Clause of the United States Constitution.

All parties agree that analysis of this issue must be guided by the United States Supreme Court's decision in *Western and Southern Life Insurance Company v. State Board of Equalization of California*, 101 S. Ct. 2070 (1981), a case in which the validity of California's retaliatory tax was attacked. In *Western and Southern*, the U.S. Supreme Court recognized (1) that state premium taxes on foreign insurers could not be attacked on Commerce Clause grounds because the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, removed all limitations on state powers in regulating the insurance business and (2) that the Privileges and Immunities Clause is inapplicable to corporations. The *Western and Southern* Court held that "[o]nly the Equal Protection Clause remains as a possible ground for invalidation of the California tax." 101 S. Ct. at 2077 (Footnote omitted). The Court then approved California's retaliatory tax against equal protection arguments similar to those raised by the plaintiffs in these cases.

The *Western and Southern* Court held that in the context of a differential premium tax, the federal equal protection issue must be resolved by a two step analysis: (1) whether the state purpose (in enacting the challenged legislation) is a legitimate one; and (2) whether it was reasonable for the state legislature to believe that use of the challenged classification would promote that purpose. 101 S. Ct. at 2084-85. The Supreme Court of Alabama, applying Alabama's equal protection analysis, has held, similarly, that plaintiffs who mount an equal protection attack bear the heavy burden of negativing every conceivable basis which might support the challenged statute. *Esperton v. Gulas Wrestling Enterprises*, 406 So. 2d 366 (Ala. 1981); *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979).

A review of the statute, on its face, reveals at least two purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in



Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute. Under the *Western and Southern* analysis, this Court finds these purposes to be legitimate. The evidence submitted also establishes the existence of at least these purposes.

The next question required to be answered by *Western and Southern* is whether it was reasonable for the state legislature to believe that use of the challenged classification would promote these purposes. Based on the evidence presented and the briefs of the parties, it is this Court's opinion that the Alabama legislature could have reasonably believed that the statute's classification would promote the foregoing purposes as well as perhaps other, additional legitimate state purposes. It is evident from all the considerations which may have been presented to the legislature and those of which this Court may take judicial notice that this question is at least debatable. Thus the challenged statutes withstand the strictures of the Fourteenth Amendment. *Western and Southern*, *supra*.

Plaintiffs argue that other federal and state constitutional provisions are contravened by the statutes in question. In the opinion of this Court, these other bases of attack are not well founded.

The Court is therefore of the opinion that the plaintiffs' motions for summary judgment herein are due to be and the same hereby are denied. The Court is of the further opinion that the defendant's and intervenors' motions for summary judgment herein are due to be and the same hereby are granted.

This decision also makes it unnecessary to consider the questions presented with respect to (a) the specific amount of taxes paid by each of the plaintiffs, and (b) the sufficiency and timeliness of the steps taken by the plaintiffs in perfecting their appeals.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that final judgment is entered in favor of the defendant and intervenors, and against the plaintiff in each of the cases consolidated herein. Costs in each case are taxed against the plaintiff, for which let execution issue.

DONE at Montgomery, Alabama, on this 17th day of May, 1982.

/s/ H. Randall Thomas
Circuit Judge



IN THE SUPREME COURT OF ALABAMA

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METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
a mutual life insurance company,
a New Jersey corporation,

THE PRUDENTIAL PROPERTY AND CASUALTY
INSURANCE COMPANY,
a New Jersey corporation,

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
a New York corporation,

NEW YORK LIFE INSURANCE COMPANY,
a New York corporation,

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
a New York corporation,

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
a Massachusetts corporation,

THE PAUL REVERE LIFE INSURANCE COMPANY,
a Massachusetts corporation,

THE PAUL REVERE VARIABLE ANNUITY
INSURANCE COMPANY,
a Massachusetts corporation,

STATE MUTUAL LIFE ASSURANCE
COMPANY OF AMERICA,
a Massachusetts corporation,

MASSACHUSETTS BAY INSURANCE COMPANY,
a Massachusetts corporation,

HANOVER INSURANCE COMPANY,
a New Hampshire corporation,

THE TRAVELERS INSURANCE COMPANY (ACCIDENT),
a Connecticut corporation,

THE TRAVELERS INSURANCE COMPANY (LIFE),
a Connecticut corporation,

INDUSTRIAL INDEMNITY COMPANY,
a California corporation

INTERNATIONAL INSURANCE COMPANY,
an Illinois corporation,

UNITED STATES FIRE INSURANCE COMPANY,
a New York corporation,

THE NORTH RIVER INSURANCE COMPANY,
a New Jersey corporation,

HARTFORD CASUALTY INSURANCE COMPANY,
a New Jersey corporation,

HARTFORD FIRE INSURANCE COMPANY,
a Connecticut corporation,

TWIN CITY FIRE INSURANCE COMPANY,
a Minnesota corporation,

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a Connecticut corporation,

HARTFORD LIFE AND ACCIDENT COMPANY,
a Connecticut corporation,



HARTFORD VARIABLE ANNUITY LIFE INSURANCE COMPANY,
a Connecticut corporation,

NEW YORK UNDERWRITERS INSURANCE COMPANY,
a New York corporation,

HARTFORD LIFE INSURANCE COMPANY,
a Connecticut corporation,

THE TRAVELERS INDEMNITY COMPANY OF AMERICA,
a Georgia corporation,

THE PHOENIX INSURANCE COMPANY,
a Connecticut corporation,

THE CHARTER OAK FIRE INSURANCE COMPANY,
a Connecticut corporation,

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
a Connecticut corporation,

THE TRAVELERS INDEMNITY COMPANY
OF RHODE ISLAND,
a Rhode Island corporation,

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,
a California corporation,

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
a Massachusetts corporation,

THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
a Connecticut corporation,

AETNA LIFE INSURANCE AND ANNUITY COMPANY,
a Connecticut corporation,

THE AETNA CASUALTY AND SURETY COMPANY,
a Connecticut corporation,

THE STANDARD FIRE INSURANCE COMPANY,
a Connecticut corporation,

AETNA LIFE INSURANCE COMPANY,
a Connecticut corporation,
*Appellants,*

v.

HONORABLE W. G. WARD, JR., as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation,

BOOKER T. WASHINGTON LIFE INSURANCE COMPANY,
an Alabama corporation,

FEDERATED GUARANTY LIFE INSURANCE COMPANY,
an Alabama corporation,

LIBERTY NATIONAL LIFE INSURANCE COMPANY,
an Alabama corporation,

SOUTHERN UNITED LIFE INSURANCE COMPANY,
an Alabama corporation,
***Appellees***

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## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, Metropolitan Life Insurance Company, the Prudential Insurance Company of America, the Prudential Property and Casualty Insurance Company, the Equitable Life Assurance Society of the United States, New York Life Insurance Company, Mutual Life Insurance Company of New York, John Hancock Mutual Life Insurance Company, the Paul Revere Life Insurance Company, the Paul Revere Variable Annuity Insurance Company, State Mutual Life Assurance Company of America, Massachusetts Bay Insurance Company, Hanover Insurance Company, the Travelers Insurance Company (Accident), the Travelers Insurance Company (Life), Industrial Indemnity Company, International Insurance Company, United States Fire Insurance Company, the North River Insurance Company, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, Twin City Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Life and Accident Company, Hartford Variable Annuity Life Insurance Company, New York Underwriters Insurance Company, Hartford Life Insurance Company, the Travelers Indemnity Company of America, the Phoenix Insurance Company, the Charter Oak Fire Insurance Company, Connecticut Mutual Life Insurance Company, the Travelers Indemnity Company of Rhode Island, Transamerica Occidental Life Insurance Company, Massachusetts Mutual Life Insurance Company, the Travelers Indemnity Company, the Automobile Insurance Company of Hartford, Connecticut, Aetna Life Insurance and Annuity Company, the Aetna Casualty and Surety Company, the Standard Fire Insurance Company, and Aetna Life Insurance Company, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Alabama, affirming the validity of Ala. Code

§ 27-4-4 *et seq.* (1975), entered in this action on November 10, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Matthew J. Zinn
MATTHEW J. ZINN

STRYKER & JOSEPHSON
CHARTERED
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Counsel of Record for
Appellants



U.S. Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • • •

Ala. Code § 27-4-4 (1975):

§ 27-4-4. Annual tax — Foreign insurers.

(a) Every foreign insurer, except foreign life insurers, shall pay an annual premium tax amounting to four percent of the premiums received by such foreign insurer for business done in this state except as to wet marine and transportation insurance as defined in section 27-5-8, whether the same are actually received by said insurer in this state or elsewhere, during the year ending December 31, preceding. Every foreign life insurer shall pay an annual premium tax amounting to one percent of annuity considerations and an annual premium tax of three percent of any other premiums received by such foreign life insurer for business done in this state, whether the same are actually received by said insurer in this state or elsewhere, during the year ending December 31, preceding. The rate of tax on premiums shall be subject to reduction as provided in this section. Any foreign insurer beginning business in the state of Alabama after January 1, of any calendar year shall, on or before March 1, of the year succeeding the year of its entry, remit with its statement to the commissioner the taxes as required by this chapter on business written in Alabama for the preceding calendar year or fraction thereof in which it

began business as a tax for such first year or fractional year; provided, that after any such insurer has been operating in this state for one complete calendar year, it shall compute its business done in this state during said year, and upon this basis, it shall pay its taxes for that and the succeeding year. Each succeeding year the tax shall be based and paid upon business done in Alabama for the preceding calendar year, it being the intent and meaning of this section that such insurers shall pay their premium taxes on March 1, for such current year; except, that the premium taxes for the first and second year shall be paid in the manner specifically provided in this section.

The premium taxes collected in this section shall be deposited in the state treasury and credited in accordance with the following tabulation:

(1) To the credit of the state general fund, from which the legislature may appropriate funds for old age assistance purposes:

a. One hundred percent of premium tax on foreign life insurers;

b. Sixty-two and one-half percent of premium tax on all foreign property insurers; and

c. Seventy-five percent of premium tax on all other foreign insurers; and

(2) To the credit of the Alabama special educational trust fund:

a. Thirty-seven and one-half percent of premium tax on foreign property insurers; and

b. Twenty-five percent of premium tax on all other foreign insurers.

(b) If the annual statement or other report required to be made by such foreign insurer to the Alabama department of insurance, whose premiums are taxed under this chapter, for the preceding calendar year shows such insurer to have invested at the close of said year in Alabama investments, as defined in this section, the requisite percentages of its total admitted assets, the rate of premium tax hereby levied on premiums shall be that shown in the following schedules:



| Percentage of Insurer's Admitted Assets Invested in Alabama Investments | Applicable Rate of Premium Tax for Foreign Life Insurers | Applicable Rate of Premium Tax for All Other Foreign Insurers |
|---|---|---|
| Less than 1% | 3.0% | 4.0% |
| 1% and above but less than 2% | 2.9% | 3.9% |
| 2% and above but less than 3% | 2.8% | 3.8% |
| 3% and above but less than 4% | 2.7% | 3.7% |
| 4% and above but less than 5% | 2.6% | 3.6% |
| 5% and above but less than 6% | 2.5% | 3.5% |
| 6% and above but less than 7% | 2.4% | 3.4% |
| 7% and above but less than 8% | 2.3% | 3.3% |
| 8% and above but less than 9% | 2.2% | 3.2% |
| 9% and above but less than 10% | 2.1% | 3.1% |
| 10% and above | 2.0% | 3.0% |

(c) Alabama investments, as used in this section, shall mean any of the following investments:

(1) Real estate in this state;

(2) Bonds or interest-bearing warrants or other evidences of indebtedness of the state of Alabama or of any county, city, town, school district, state educational institution, municipality or other subdivision of the state, or of any duly authorized agency, board or authority of the state of Alabama or of any political subdivision thereof whether such agency, board or authority now exists or is hereafter created;

(3) Stocks, bonds or other evidences of indebtedness of any housing or redevelopment authority organized under the Housing Authorities Law or Redevelopment Law of the state of Alabama, as from time to time established and amended;

(4) Notes or bonds secured by mortgages or other liens on real estate or leasehold interests in real estate in the state of Alabama;

(5) Stocks, bonds, debentures, notes or other evidences of indebtedness of any corporation organized under the laws of the state of Alabama;

(6) Notes, debentures or other evidences of any indebtedness of any business operated as a sole proprietorship, partnership or other legal entity having its principal office and place of business in the state of Alabama;

(7) Notes, bonds or other evidences of indebtedness secured by mortgage or other lien upon real estate situated in the state of Alabama and insured or guaranteed, in whole or in part, by the United States or any agency or instrumentality thereof, together with any bonds, debentures or other evidences of indebtedness of the United States or any agency or instrumentality thereof received and retained in whole or partial settlement of any such insurance or guaranty;

(8) Collateral loans to Alabama residents or to others where at least one half of the value of the collateral so pledged constitutes an Alabama investment as defined in this section;

(9) Cash deposits in regularly established national or state banks in this state on the basis of the average monthly deposits throughout the calendar year;

(10) Loans secured by policies on the lives of residents of the state of Alabama;

(11) Share or share accounts of building and loan associations organized under the laws of the state of Alabama or in the share or share accounts of federal savings and loan associations having their principal office in the state of Alabama;



(12) Stocks, bonds, notes, debentures or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States, to the extent that the assets of such corporation located in the state of Alabama bear to the total assets of the corporation issuing such stocks, bonds, notes or other evidences of indebtedness;

(13) Stocks, bonds, notes or other evidences of indebtedness issued by railroad companies, public carriers or transportation companies, to the extent that its trackage or mileage in Alabama bears to the total trackage or mileage of such railroad, public carrier or other transportation company;

(14) That percentage of such insurer's investments in stocks, bonds, notes or other evidences of indebtedness of any telegraph, telephone, electric power company or other public utility to the extent that the revenue of any such company from Alabama bears to the total of such telegraph, telephone, electric power company or other public utility; and

(15) That percentage of the insurer's investments held as of December 31, in direct obligations of the United States of America as the total premiums received by the company for direct insurance of subjects located, resident or to be performed in Alabama relate to the total premiums received by the insurer.

(d) Any such tax so determined shall be subject to credit and deduction of the full amount of:

(1) All ad valorem taxes paid by the insurer for the tax year next preceding the filing of the return required by this section upon any real estate and the improvements thereon in the state of Alabama owned and at least 80 percent occupied by the insurer for the full period of such tax year;

(2) All license fees and taxes paid to any county in this state during the year preceding the filing of the return required by this section for the privilege of engaging in the business of insurance within said county;

(3) All franchise taxes paid by the insurer under the provisions of sections 40-14-40 or 40-14-41 for the tax year preceding the filing of the return required by this section; and

(4) All expense of examination of the insurer by the commissioner. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 816; Acts 1955, 2nd Ex. Sess., No. 77, p. 193, § 3; Acts 1969, Ex. Sess., No. 28, p. 74, § 2; Acts 1971, No. 497, p. 707, § 79; Acts 1971, No. 2106, p. 3875, § 2.)

Ala. Code § 27-4-5 (1975):

§ 27-4-5. Same — Domestic insurers.

(a) Every domestic life insurer shall pay to the commissioner on or before March 1, 1970, and annually thereafter, a premium tax equal to one percent of the premiums and annuity considerations received by such insurer for business done in this state during the preceding calendar year ending December 31, whether the same are actually received by said insurer in this state or elsewhere. Every other domestic insurer and every nonprofit corporation organized pursuant to the provisions of section 10-4-100 et seq. shall pay to the commissioner on or before March 1, 1970, and annually thereafter, a premium tax equal to one percent of the premiums received by such insurer for business done in this state during the preceding calendar year ending December 31, whether the same are actually received by said company in this state or elsewhere. Any domestic insurer beginning business after January 1, of any calendar year, on or before March 1, of the year following the year beginning business, shall remit with its statement to the commissioner



the taxes as required by this section on business written in Alabama for the preceding calendar year or fraction thereof in which it began business as a tax for such first year or fractional year; provided, that after any domestic insurance company has been operating in this state for one complete calendar year, it shall compute its business done in this state during said year, and upon this basis, it shall pay its taxes for that and the succeeding year. Each succeeding year the tax shall be based and paid on business done in Alabama for the preceding calendar year as provided in this section, it being the meaning and intent of this section that domestic insurers shall pay their premium taxes on March 1, for such current year; except that premium taxes for the first and second year shall be paid in the manner specifically provided in this section.

(b) Any such tax so determined shall be subject to credit and deduction of the full amount of:

(1) All ad valorem taxes paid by the insurer for the tax year preceding the filing of the return required by this section upon any building and real estate in the state of Alabama owned and occupied, in whole or in part, by the insurer for the full period of such tax year as its principal office in the state of Alabama;

(2) All ad valorem taxes paid by the insurer for the tax year preceding the filing of the return required by this section upon all other real estate and improvements thereon in this state owned and at least 50 percent occupied by the insurer for the full period of such tax year;

(3) All license fees and taxes paid to any county in this state during the year preceding the filing of the return required by this section for the privilege of engaging in the business of insurance within said county;

(4) All expenses of examination of the insurer by the commissioner;

(5) All license or privilege taxes on lists of securities paid by the insurer under the provisions of section 40-24-8 during the tax year preceding the filing of the return required by this section; and

(6) All franchise taxes paid by the insurer under the provisions of section 40-14-40 for the tax year preceding the filing of the return required by this section.

(c) The premium taxes collected under this section shall be deposited in the state treasury and credited as follows:

(1) To the credit of the state general fund:

a. Fifty percent of premium tax on domestic life insurers;

b. No part of premium tax on nonprofit corporations organized pursuant to the provisions of section 10-4-100 et seq.; and

c. Twenty-five percent of premium tax on all other domestic insurers; and

(2) To the credit of the Alabama special educational trust fund:

a. Fifty percent of premium tax on domestic life insurers;

b. One hundred percent of premium tax on nonprofit corporations organized pursuant to the provisions of section 10-4-100 et seq.; and

c. Seventy-five percent of premium tax on all other domestic insurers.

(d) Every domestic insurer, anything in this chapter to the contrary notwithstanding, shall be exempt from and not required to pay any premium tax for or on account of



any premiums or annuity considerations for hospital, medical, surgical or other health care benefits supplementary to Medicare and Medicaid received by it for or on account of business done in this state, whether the same are actually received in this state or elsewhere. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 819; Acts 1945, No. 156, p. 196; Acts 1955, 2nd Ex. Sess., No. 77, p. 193, § 4; Acts 1969, Ex. Sess., No. 28, p. 74, §§ 3, 3½; Acts 1971, No. 497, p. 707, § 60; Acts 1971, No. 2106, p. 3375, §§ 3, 3½.)

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STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

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Civil Nos. 31665 & 31666

METROPOLITAN LIFE INSURANCE COMPANY, PRUDENTIAL INSURANCE COMPANY OF AMERICA, PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
*Plaintiffs,*

vs.

THE COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF NORTH DAKOTA AND THE STATE OF NORTH DAKOTA,
*Defendants.*

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above-captioned matter came on for trial before the undersigned Judge of the District Court beginning on October 25, 1982. C. Nicholas Vogel and Nicholas J. Spaeth of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., represented the plaintiffs. Kathryn Dietz and Marilyn Foss of the North Dakota Attorney General's Office, Albert Hausauer and M. Kathryn Heitkamp of the North Dakota State Tax Department, and Gregory Morris of the North Dakota Insurance Department represented the defendants. Pursuant to Rule 52 of the North Dakota Rules of Civil Procedure, the Court makes the following findings of fact, conclusions of law, and order for judgment.



*FINDINGS OF FACT*

1. Plaintiff Metropolitan Life Insurance Company is a corporation organized and incorporated under the laws of the State of New York. Plaintiffs Prudential Insurance Company of America and Prudential Property and Casualty Insurance Company are corporations organized and incorporated under the laws of the State of New Jersey. Plaintiff Massachusetts Mutual Life Insurance Company is a corporation organized and incorporated under the laws of Commonwealth of Massachusetts. Each of the plaintiffs maintains its headquarters and principal place of business outside the State of North Dakota.

2. Each of the plaintiffs conducts a nationwide business in insurance. During the years 1971 through 1980, each plaintiff was properly licensed in North Dakota, and each plaintiff conducted an extensive insurance business in North Dakota.

3. Defendants are the Commissioner of the Department of Insurance of North Dakota and the State of North Dakota.

4. For the years 1971 through 1980, plaintiffs were subject to a gross premium tax of 2.5 percent of the gross amount of premiums, membership fees, and policy fees received in the State of North Dakota, pursuant to § 26-01-11(1) of the North Dakota Code, which applies to insurance companies not organized under the laws of North Dakota.

5. The Commissioner of Insurance is charged by the North Dakota Constitution, Article V, Section 18, and N.D.C.C. § 26-01-11, with the task of collecting this gross premiums tax from insurance companies not organized under the laws of North Dakota. All premium tax revenues collected by the Commissioner are deposited in the Treasury of the State of North Dakota.

6. Prior to trial, the claims of plaintiffs Metropolitan Life, Prudential, Prudential Property and Casualty and Massachusetts Mutual Life were severed from those of the following other insurance companies who are also plaintiffs in this action: Mutual Life Insurance Company of New York, Equitable Life Assurance Society of the United States, New York Life Insurance Company, Connecticut Mutual Life Insurance Company, John Hancock Mutual Life Insurance Company, Manhattan Life Insurance Company, Aetna Life Insurance Company, Aetna Casualty and Surety Company, Standard Fire Insurance Company, Automobile Insurance Company of Hartford, Connecticut, Transamerica Occidental Life Insurance Company, and Transamerica Life Insurance and Annuity Company. Each of these latter companies is also incorporated and headquartered outside the State of North Dakota and is in all material respects similarly-situated to the four plaintiffs who went to trial on their claims. These parties also make identical claims in their Complaint.

7. For the years 1971 through 1980, insurance companies organized under the laws of North Dakota were subject to the following taxes: a state corporate income tax imposed on taxable income at a graduated rate of between 2 percent and 7 percent, N.D.C.C. § 57-38-30; a business and corporation privilege tax of 1 percent of taxable income in excess of $2,000.00, N.D.C.C. § 57-38-08 (repealed by S.L. 1979), ch. 612, § 8, effective January 1, 1981); and the Vietnam Bonus Tax which imposed a graduated tax of between $10.00 and $25.00 for the tax years 1972, 1973 and 1974.

8. Except for the taxes listed above, insurance companies organized under the laws of North Dakota paid no other taxes for the years 1971 through 1980 which were not also paid on an equal basis by companies organized under the laws of other states.



9. At trial, the court received into evidence documents indicating the amount of premium taxes paid by plaintiffs to defendants for the years of 1971 through 1980. The court also received into evidence North Dakota corporate income and business and privilege tax returns prepared by plaintiffs for each taxable year 1971 through 1980. These returns, introduced through the testimony of senior tax accountants from each company, indicated the amount of taxes each plaintiff would have paid if taxed as a North Dakota-incorporated insurance company. The returns were prepared in accordance with instructions submitted by defendants in a letter dated February 12, 1982, from their counsel, Albert Hausauer, to counsel for plaintiffs, Nicholas J. Spaeth. This letter was also received by the court into evidence. The plaintiffs' federal income tax returns were used as a basis for computing the North Dakota taxes, in addition to other business and accounting records of plaintiffs.

10. At trial, defendants objected to the introduction of the returns on the grounds that they were hearsay and were not properly prepared. The court finds that these objections are without merit. Defendants neither seriously discredited the accuracy of the returns on cross-examination nor did they offer any rebuttal testimony that would establish their lack of reliability and relevancy. Defendants' hearsay objection is also without merit. The returns were prepared by expert accountants and admissible under N.D.R. Evid. 702 *et seq.* as reports or compilations by an expert. The information used in compiling the returns was based on business records maintained by plaintiffs and was itself independently admissible on that basis.

11. The following tables contain the correct figures for what plaintiffs actually paid in gross premiums taxes to the State of North Dakota, what plaintiffs would have paid instead to the State of North Dakota if taxed as domestically-incorporated insurance companies, and the difference between these figures:

## MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

| Year | North Dakota Premium Taxes Paid by Company | Taxes Company Would Have Paid If a North Dakota Company Income Tax | + Privilege Taxes | = Total | Difference |
|---|---|---|---|---|---|
| 1971 | $ 15,850.59 | $3,044 | $ 771 | = $ 3,115 | $ 12,735 |
| 1972 | 17,885.39 | 5,602 | 1,087 | = 6,689 | 11,196 |
| 1973 | 18,465.49 | 5,456 | 1,061 | = 6,517 | 11,948 |
| 1974 | 23,245.53 | 4,250 | 1,323 | = 5,551 | 17,695 |
| 1975 | 29,889.95 | 4,264 | 1,321 | = 5,585 | 24,305 |
| 1976 | 28,681.15 | 4,750 | 1,482 | = 6,219 | 22,462 |
| 1977 | 29,444.59 | 4,889 | 1,541 | = 6,529 | 22,916 |
| 1978 | 37,541.18 | 8,239 | 1,917 | = 10,148 | 27,393 |
| 1979 | 44,833.48 | 6,727 | 1,511 | = 8,238 | 36,594 |
| 1980 | 48,054.79 | 9,419 | 2,069 | = 11,488 | 36,567 |
| TOTAL | $329,591.44 | | | $66,562 | $263,347 |

## PRUDENTIAL PROPERTY AND CASUALTY COMPANY

| Year | North Dakota Premium Taxes Paid by Company | Taxes Company Would Have Paid If a North Dakota Company Income Tax | + Privilege Taxes | = Total | Difference |
|---|---|---|---|---|---|
| 1975 | $ 1,810.38 | 0 | | = | $ 1,810.38 |
| 1976 | 7,222.38 | 0 | | = | 7,222.38 |
| 1977 | 12,448.00 | 0 | | = | 12,448.00 |
| 1978 | 16,508.48 | 0 | | = | 16,508.48 |
| 1979 | 18,348.69 | 0 | | = | 18,348.69 |
| 1980 | 18,725.63 | 0 | | = | 18,725.63 |
| TOTAL | $75,063.56 | | | | $75,063.56 |

## PRUDENTIAL INSURANCE COMPANY

| Year | North Dakota Premium Taxes Paid by Company | Taxes Company Would Have Paid If a North Dakota Company Income Tax | + Privilege Taxes | = Total | Difference |
|---|---|---|---|---|---|
| 1971 | $ 113,641.49 | $12,236 | $3,928 | =$ 16,164 | $ 97,477 |
| 1972 | 113,568.82 | 18,767 | 4,796 | = 20,563 | 92,806 |
| 1973 | 126,716.46 | 18,519 | 5,532 | = 24,051 | 102,665 |
| 1974 | 151,981.90 | 19,822 | 6,117 | = 25,939 | 126,043 |
| 1975 | 180,150.22 | 14,004 | 4,220 | = 18,414 | 161,736 |
| 1976 | 216,761.21 | 16,620 | 5,044 | = 21,664 | 195,097 |
| 1977 | 231,458.56 | 18,287 | 5,550 | = 23,837 | 207,617 |
| 1978 | 271,597.56 | 33,346 | 7,238 | = 40,584 | 231,014 |
| 1979 | 296,419.78 | 38,623 | 8,155 | = 46,778 | 249,642 |
| 1980 | 253,781.40 | 17,991 | 3,328 | = 21,319 | 232,462 |
| TOTAL | $1,965,972.40 | | | $259,812 | $1,696,560 |

## METROPOLITAN LIFE INSURANCE COMPANY

| Year | North Dakota Premium Taxes Paid by Company | Taxes Company Would Have Paid If a North Dakota Company Income Tax | + Privilege Taxes | = Total | Difference |
|---|---|---|---|---|---|
| 1970 | $ 41,445.58 | $ 4,754 | $1,652 | =$ 6,556 | $ 34,887.58 |
| 1971 | 49,471.55 | 5,296 | 1,763 | = 7,058 | 42,413.55 |
| 1972 | 56,167.06 | 6,677 | 2,183 | = 8,860 | 47,307.06 |
| 1973 | 61,254.58 | 7,587 | 2,481 | = 9,968 | 51,286.58 |
| 1974 | 67,743.75 | 9,271 | 2,964 | = 12,235 | 55,508.75 |
| 1975 | 65,481.45 | 6,321 | 1,891 | = 8,212 | 57,269.45 |
| 1976 | 65,999.53 | 5,375 | 1,685 | = 7,058 | 58,941.53 |
| 1977 | 67,490.98 | 5,666 | 1,778 | = 7,444 | 60,046.98 |
| 1978 | 72,909.08 | 8,658 | 2,009 | = 10,667 | 62,242.08 |
| 1979 | 77,716.53 | 12,075 | 2,639 | = 14,714 | 63,002.53 |
| 1980 | 73,905.45 | 2,554 | 394 | = 2,948 | 70,957.45 |
| TOTAL | $709,585.49 | | | $96,552 | $613,033.49 |

12. The court finds beyond a reasonable doubt that the North Dakota statutory scheme for taxing insurance companies places a more onerous burden on out-of-state incorporated companies than is placed upon North Dakota-incorporated companies, and that it does so based solely on the place of incorporation of the taxpayer. The gross premiums tax places a tax burden on out-of-state incorporated companies that is far in excess of the amount such companies would pay under the North Dakota corporate income, business and corporation privilege, and the Vietnam Bonus taxes applicable to North Dakota-incorporated companies.

13. The finding of a significant discrepancy in tax burden is supported by the testimony of the defendants' own expert economist, who testified that the effective North Dakota income tax rate on gross corporate receipts is .02 percent. Since the gross premiums tax is a gross receipts tax, by the estimation of the defendants' own expert, insurance companies incorporated outside the State pay a tax levied at a significantly higher rate than that levied on North Dakota-incorporated insurance companies.

14. A principal effect of the more onerous tax liability of out-of-state insurance companies doing business in North Dakota during the years 1971 through 1980 was to reduce their profits, thereby causing them injury. Another effect of the gross premiums tax was to raise the price of insurance in North Dakota generally.

15. Plaintiffs introduced no evidence at trial relative to the issue of protest.

16. The gross premiums tax was enacted in 1897 as Chapter 94 of the Laws of North Dakota of 1897. The only legislative purpose articulated was to raise revenue for the State.



17. Defendants presented, through their expert economist, a list of six other proposed legislative motives or purposes. In addition, defendants' brief suggested 17 other possible legislative purposes. Each purpose or motive was advanced by defendants in support of their argument that the gross premiums tax is rationally related to the achievement of a legitimate state purpose. None of these reasons were advanced by the legislature as a basis for adopting the gross premiums tax on out-of-state incorporated insurance companies.

18. Indeed, at the time gross premiums tax was adopted by the legislature, there were no North Dakota-incorporated insurance companies. The sole purpose in adopting the tax was to raise revenue.

19. To the extent that any of the other purposes advanced by defendants were considered by the legislature they are either not legitimate or are not rationally related to the achievement of a legitimate state purpose. Similar purposes were presented to the United States Supreme Court by the State of Ohio in *Reserve Life Insurance Company v. Bowers*, 380 U.S. 258 (1965), to justify a tax which, like North Dakota's, discriminated against out-of-state insurance companies. Since the Supreme Court rejected those arguments and summarily reversed a state court decision upholding the tax, it is manifest that those purposes cannot suffice to save a discriminatory tax from invalidity. The purpose which defendants have stressed the most is the legislature's supposed desire to protect the domestic insurance industry. There is nothing in the record to indicate that the legislature actually entertained this purpose. Moreover, the tax has not aided the domestic industry which lost ground to foreign insurers during the years 1971 through 1980. In any event, a purpose to protect the domestic insurance industry by discriminating against out-of-state insurance companies is not legitimate under the equal protection clause.

20. The actions of the North Dakota Insurance Commissioner have been purely ministerial or discretionary in nature. Plaintiffs have failed to plead and prove any bad faith acts on the part of the Commissioner. Proof of such acts is required for liability under 42 U.S.C. § 1983 because of the partial immunity or defense of good faith available to the Commissioner.

21. Because they voluntarily paid the gross premium tax plaintiffs are not entitled to recover any refund on that basis. Nothing was presented to the Court to establish protest or payments of the gross premium tax under duress or compulsion of any sort.

22. No evidence in the record supports a conclusion that the plaintiffs had a contractual or quasi-contractual relationship with the defendants which would entitle the plaintiffs to a refund of gross premium taxes paid as damages. In the absence of such a contractual relationship the State of North Dakota is entitled to sovereign immunity and is not liable for any refund of gross premium taxes paid by the plaintiffs.

23. Part of the expense of gross premium taxes paid by the plaintiffs was passed through to their customers in the form of higher insurance premiums. To allow a refund of gross premium taxes to the plaintiffs would, under these circumstances, result in a windfall to them.

24. To calculate the appropriate amount of any refund which would be due in the absence of sovereign immunity, voluntarily payment, laches, and windfall profit, the effect of the retaliatory tax imposed by § 26-01-05, N.D.C.C., along with other statutes and factors would have to be considered. Clearly the amount of any refund would not be the difference between the amount of gross premium taxes paid and corporate income tax which would otherwise have been owed.



## CONCLUSIONS OF LAW

1. N.D.C.C. § 26-01-11(1) discrimination beyond a reasonable doubt in favor of insurance companies incorporated under the laws of the State of North Dakota and against insurance companies incorporated under the laws of other states by imposing a significantly higher tax burden on out-of-state incorporated insurance companies.

2. The discrimination embodied in N.D.C.C. § 26-01-11(1) is not rationally related to the achievement of a legitimate state purpose. The purpose of the statute—to raise revenue for the State solely from out-of-state incorporated insurance companies—is not a legitimate State purpose under the governing decisions of the United States Supreme Court.

3. N.D.C.C. § 26-01-11(1) is thus manifestly and beyond a reasonable doubt unconstitutional under the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is unconstitutional notwithstanding the strong presumptions in favor of the constitutionality of a legislative enactment in force in the State of North Dakota.

4. N.D.C.C. § 26-01-11(1) is also unconstitutional under the equal protection component of the North Dakota State Constitution, Art. I, § 22. The North Dakota Supreme Court has construed that Clause to be coextensive with the equal protection clause of the Fourteenth Amendment of the United States Constitution and has followed applicable decisions of the United States Supreme Court.

5. The other purposes advanced by defendants as rational basis for the discrimination of N.D.C.C. § 26-01-11(1) were not discussed or considered by the legislature when it enacted and reenacted the statute.

6. Even if defendants' other purposes had been part of the legislative basis for adopting § 26-01-11(1), these purposes are inadequate to justify the discrimination in the statute.

7. The Court declares § 26-01-11(1) to be unconstitutional and hereby declares that defendants, their agents, employees and representatives should be enjoined from taking any action to enforce or levy against plaintiffs the provisions of said title from the date of this judgment forward.

8. Plaintiffs' claims for refunds are dismissed for all premium taxes due to the State's sovereign immunity, plaintiffs' laches and voluntary payment, and the windfall to plaintiffs which would otherwise result.

9. That plaintiffs have failed to establish any right to relief against the North Dakota Insurance Commissioner under 42 U.S.C. § 1982.

ORDER FOR JUDGMENT

WHEREFORE, and in light of the foregoing, it is hereby ORDERED, that judgment be entered as follows:

1. That N.D.C.C. § 26-01-11(1) is unconstitutional under the applicable equal protection components of the federal and state constitutions;

2. That from the date of this Order defendants are permanently enjoined from levying, applying, collecting, or taking any action whatsoever to enforce the tax imposed by N.D.C.C. § 26-01-11(1), directly or indirectly;

3. That plaintiffs' 42 U.S.C. § 1983 claim is hereby dismissed;

4. That plaintiffs' claims for damages for premium taxes paid is hereby dismissed;

5. That plaintiffs' are not relieved from liability for any premium taxes for 1982 that are due but unpaid prior to the effective date of this Order;



6. All costs and disbursements herein shall be borne by the party which incurred them.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 23, 1983

/s/ Larry M. Hatch
LARRY M. HATCH
Judge of the District Court

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

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No. 96

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On Appeal From the Supreme Court of Ohio and From the Court of Appeals, First Appellate District, State of Ohio

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RESERVE LIFE INSURANCE COMPANY,
*Appellant*,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
*Appellee*.

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# BRIEF OF APPELLEE

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## QUESTION PRESENTED

The question presented by this case is as follows:

When an Ohio statute which imposes an *ad valorem* tax upon personal property used in business is applied to a foreign insurance company, is there a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States merely because the franchise tax upon domestic insurance companies is *in lieu* of all other taxes upon the property and assets of domestic insurance companies except for taxes upon real estate?



## STATEMENT OF THE CASE

The summary of facts set forth by the appellant's Statement of the Case is substantially correct. However, one addition and one clarification appear to be in order.

The personal property upon which the *ad valorem* tax involved in this case was assessed, consists of furniture and equipment owned by the appellant and used in business by the appellant in various counties in the State of Ohio.

A foreign insurance company would, under the Ohio law, be subject to exactly the same real estate tax *rates* as a domestic insurance company, provided each owned real estate located in Ohio and in the same taxing district, or in taxing districts with identical tax rates. The facts in this case are stipulated, and there is no stipulated fact, evidence or testimony of record which indicates that the appellant herein owned, or owns, any real estate in the State of Ohio.

## SUMMARY OF ARGUMENT

In Ohio's taxing structure the taxation of the franchise of a domestic insurance company and the personal property of such a company is interrelated, with the franchise tax being set at such a rate that the legislature determined that it should be *in lieu* of an *ad valorem* tax upon personal property used in business by such a company. The franchise tax levied upon foreign insurance companies is not *in lieu* of an *ad valorem* tax upon the personal property used by them in business in Ohio. The effect of the tax structure, in its entirety, is in favor of domestic companies but entirely within the bounds of preference permitted by the Fourteenth Amendment for the purpose of serving the public interest. The basis upon which it is conceived is clearly rational. The appellant's challenge runs primarily to the mode or man-

ner employed by Ohio in arriving at this entirely reasonable and proper result.

Where two or more proper modes of arriving at an entirely permissible result are available, the one employed by a state cannot be declared unconstitutional merely because the taxpayer affected would have preferred that a different mode by employed.

In exercising the right of engaging in the insurance business in Ohio, the appellant is not a person within the scope of the Fourteenth Amendment to the Constitution of the United States.

## ARGUMENT

### I—When Viewed in Its Entirety the Challenged Statute Is Constitutional

The appellant admits at the outset of its brief that only the constitutional validity of one tax, namely, Ohio's *ad valorem* tax on tangible personal property used in business, is involved in this case. However, the appellant immediately launches into a discussion of the Ohio franchise tax law applicable to domestic and foreign insurance companies. It is thus apparent that appellant's challenge of Ohio's *ad valorem* tax is not based upon alleged discrimination between the treatment of the personal property used by the appellant in its business, in Ohio, and the personal property used by persons resident of Ohio in their businesses generally. Rather, appellant's challenge is based upon an alleged discrimination in the treatment of that personal property used in business by the appellant, a foreign insurance company, as compared with personal property of a domestic insurance company. Further, it is contended that the alleged discriminatory treatment results because Chapter 5729, Ohio Revised Code, which levies a franchise tax measured by the business done by a foreign insurance company in Ohio at the rate of two and one-half per cent of the gross premiums



received less returned premiums and consideration received for reinsurance, does not contain an *in lieu of* proviso such as appears in Section 5725.25, Ohio Revised Code. Section 5725.18, Ohio Revised Code, levies an annual franchise tax upon domestic insurance companies upon the privilege of being an insurance company computed by either of two options, one of which results in an effective rate of 1.67% upon gross premiums less deductions of the same type allowed foreign insurance companies. Section 5725.25, *supra*, provides with respect thereto, in part:

> "The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, *shall be in lieu of* all other taxes on the other property and assets of such domestic insurance company * * *" (Emphasis added.)

It has been recognized that foreign corporations cannot do business within a state except by the consent of the state—a state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. *Hanover Fire Insurance Company v. Harding (Hanover Fire Insurance Company v. Carr)*, 272 U.S., 494, 71 L.Ed., 372, 47 S.Ct., 179.

It is also well settled that:

> "A state may impose a rate of taxation upon a foreign corporation for the privilege of doing business within the state which differs from the rate that it applies to its own corporations upon the franchises which the state grants in creating them." *Cheney Bros. Co. v. Massachusetts*, 246 U.S., 147, 62 L.Ed., 632, 38 S.Ct., 295.

As was stated by the court in *Baltic Mining Co. v. Massachusetts*, 231 U.S., 68, 58 L.Ed., 127, 34 S.Ct., 15:

"• • • Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a state to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

Also relative to this point is *Carmichael v. Southern Coal & Coke Co.*, 301 U.S., 495, 81 L.Ed., 1245, 57 S.Ct., 868:

"Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation, and inequalities which result from the singling out of one particular class for taxation or exemption infringe no constitutional limitation.

"The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

The appellee is not unaware of the qualifications of the foregoing, as stated in the *Hanover* case, *supra*:

"• • • there is a very important qualification to this power of the state, • • • That qualification is that a state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. • • •"

However, this statement may be more readily understood by reference again to the *Carmichael* case, *supra*, in which it was said:

"Where the public interest is served, one business may be left untaxed and another taxed in order to promote the one, or to restrict or suppress the other."

See also *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S., 522, 3 L.Ed. 2d, 480, 79 S.Ct., 437, wherein it was held:



"A statute which encourages the location within the state of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the equal protection clause of the Fourteenth Amendment."

The significance of all the foregoing is that Ohio's franchise tax, as applied to both foreign and domestic insurance companies, is constitutional. Even the appellant recognizes this at page 12 of its brief when it states that it "is not challenging the discriminatory franchise tax exacted from it by the State of Ohio." In fact, the appellant "accepts the more modern line of authority" as outlined in the cases cited *supra*.

But then the appellant, although it "is not challenging" Ohio's franchise tax, immediately challenges Ohio's *ad valorem* tax and uses as a basis of its attack a provision of the Ohio franchise tax law.

It is submitted that in order to evaluate the appellant's challenge the substance of these laws must be viewed in their entirety. As stated in *Wheeling Steel Corporation v. Glander*, 337 U.S., 562, 93 L.Ed., 1544, 69 S.Ct., 1291:

"In testing the validity of a state tax statute, the Supreme Court of the United States deals with it as an entirety as it is found in operation, and passes only on the constitutionality of that which the state has asserted power and purpose to do."

The word "lieu" is defined by Black's Law Dictionary, Fourth Edition, as follows:

"LIEU. Fr. Place; room. It is only used with 'in;' *in lieu*, instead of. Enc. Lond."

Said authority also contains the following definition:

"LIEU TAX. A lieu tax means instead of or a substitute for, and it is not an additional tax. Lebeck v. State, 62 Ariz. 171, 156 P.2d 720, 721."

Webster's Third New International Dictionary defines "lieu" to mean "instead" and "in lieu of" to mean "in place of; instead of," after which appears the following example: "rendered three days' work in lieu of rent."

It is therefore perfectly clear that in its entirety the Ohio law does not "exempt" domestic insurance companies from *ad valorem* taxation of their personal property, rather their personal property is taxed in a substitute manner, *via* the imposition of a franchise tax. In the case of *Cincinnati Air Taxi, Inc. v. Bowers*, 173 Ohio St., 99, 180 N.E. 2d, 17 (1962), the phrase "in lieu of all other taxes" was before the court and with respect thereto the Supreme Court of Ohio said:

> "By Section 4561.18, Revised Code, aircraft owners are placed in a special and preferred class, and full compliance with that statute is a prerequisite to escaping the general property tax. Of course, the license taxes imposed by that section 'are *in lieu of all other taxes* on or with respect to ownership of such aircraft,' but the provision last quoted applies only where the aircraft is licensed pursuant to an application and the taxes are paid in conformity with the terms of the statute. * * *" (Emphasis added.)

So we have in reality only a substitution of a tax, which, insofar as it applies to insurance companies, is a more or less universal practice. As stated in 14 Fletcher Cyclopedia Corporations, Section 7030, at page 1031:

> "Insurance companies may be taxed either on their property or on their business, or both, i.e., a property tax may be imposed or an excise tax or both. In most states the property tax has been discarded either wholly or in part, and an excise tax substituted therefor wholly or in part, measured either by capital or capital stock, the capital with the addition of any accumulated surplus, net valuation of policies held in the state, gross earnings or receipts, net income, or by the gross or net premiums received."



Appellant's contention is, therefore, reduced to its true nature; i.e., an assertion that although a variance of rate is permissible, as between domestic and foreign insurance companies, when taxing the privilege granted to the foreign insurance companies such variance becomes impermissible if the substitution of one tax for another occurs.

In *Allied Stores of Ohio, Inc. v. Bowers, supra*, it was determined that:

> "A classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it."

See also, *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S., 527, 75 L.Ed., 1248, 51 S.Ct., 540, and *Carmichael v. Southern Coal & Coke Co., supra.*

It is certainly not unreasonable to conceive that the Ohio legislature intended, by its substitution of the franchise tax for the personal property tax with respect to domestic insurance companies, which is no more than "a difference in the modes of taxation" which was approved in *Concordia Fire Insurance Co. v. State of Illinois*, 292 U.S., 535, 78 L.Ed., 1411, 54 S.Ct., 830, to encourage the location of insurance companies in Ohio. In the *Concordia* case, *supra*, it was determined:

> "Unconstitutional discrimination in taxation does not exist where, though there is a difference in the modes of taxation, there is substantial equality in the resulting burden, even though there is not mathematical equivalence."

Certainly, it is not unreasonable to conceive that the legislature was cognizant of the fact that all or a large part of the premiums collected by a foreign insurance

company may be withdrawn from the state, whereas the same would not ordinarily be expected with domestics. Further, all or a large part of the real estate of a domestic insurance company may reasonably be expected to be in Ohio, whereas the real estate of a foreign insurance company may reasonably be expected to be elsewhere.

The appellant has failed to show, of record, any real discrimination. The burden of establishing the unconstitutionality of a statute rests upon him who assails it. *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S., 580, 79 L.Ed., 1070, 55 S.Ct., 538.

The aggregate effect of Ohio's laws may be to tax foreign insurance companies at a rate a fraction of a per cent higher than those upon domestic insurance companies. But the appellant has not shown this to be unreasonably to its disadvantage. Mathematical equality is neither required nor obtainable. *Concordia Fire Insurance Co. v. Illinois, supra.*

It should be noted that the furniture and equipment here taxed are not of the type of property involved in *Southern Railway Co. v. Greene*, 216 U.S., 400, 54 L.Ed., 536, 30 S.Ct., 287; the appellant herein is not a captive of the State of Ohio, and its property is not of such peculiar nature as was involved in the *Greene* case, *supra*. Cf. *Cheney Bros. Co. v. Massachusetts, supra.*

II—Appellant Is Without Status To Make This Challenge

In *State ex rel. v. Ackerman*, 51 Ohio St., 163, 37 N. E., 828, it was held:

> "1. Foreign insurance companies and associations, whether incorporated, or not, before commencing business in this state, are required to obtain a certificate of authority to do so, from the Superintendent of Insurance."

In said case, it was held that *quo warranto* would lie against an unincorporated association because its acts



"are done after the manner of corporations" and such an association "may be ousted from transacting the business of insurance within this state." The basis of the holding was that right and privilege of carrying on an insurance business is an authority which emanates from the state, and the privilege granted is a franchise.

In *Robbins v. Hennessey*, 86 Ohio St., 181, 99 N. E., 319, it was stated:

> "• • • The statutes of the state now require compliance with certain conditions designed for the security and protection of the public, and, therefore, the right to transact this business is no longer a private right, but a franchise. • • •"

And in *Reuschler v. State, ex rel. Hogan*, 90 Ohio St., 363, 107 N. E., 758, *quo warranto* was allowed and a decree of ouster affirmed against an individual with the observation that:

> "It may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual. • • •"

Section 3907.01, Ohio Revised Code, provides:

> "Any number of persons, not less than thirteen, may associate and form a company to make insurance upon the lives of individuals, and every type of insurance appertaining thereto or connected therewith, on the mutual or stock plan, and to grant, purchase, or dispose of annuities."

Section 3907.02, Ohio Revised Code, provides, in part:

> "The persons forming a company under section 3907.01 of the Revised Code *shall file* in the office of the secretary of state *articles of incorporation* • • •" (Emphasis added.)

It is thus apparent that only corporations or organizations equivalent to corporations may obtain a franchise to engage in the life insurance business in Ohio.

This raises, in modified form, the question presented in the dissenting opinion of Justices Douglas and Black, in *Wheeling Steel Corporation v. Glander, supra.*

The question there raised was whether a corporation may be a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. The instant question is more limited, to wit: Is a corporation a "person" within the Equal Protection Clause of the Fourteenth Amendment, when it is exercising a right which natural persons do not possess?

It is well established that corporations are not citizens within the Privilege and Immunity Clause of the Fourteenth Amendment. However, the court has historically had difficulty with the status of corporations under the Equal Protection Clause. The early cases involved questions of jurisdiction, the rights to sue or be sued, and matters of contract. It was initially held that the rights of a corporation depended upon the citizenship of its members. Later, for purposes of jurisdiction, it was presumed that the members of the corporation were citizens of the state of incorporation. This history is set out in *Paul v. Virginia*, 75 U.S., 168, 19 L.ed., 357, 8 Wall., 168.

Then, suddenly, came the announcement in *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S., 394, 30 L.ed., 118, 6 S.Ct., 1132 (1886):

"Announcement by Mr. Chief Justice Waite:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of opinion that it does."



Thus, without argument a decision of great importance was made, a decision which, according to some historians, implied that something was hidden in the Fourteenth Amendment of which the ratifiers and all but a few of the drafters were totally unaware. See The Conspiracy Theory, 47 Yale Law Journal, 371.

Then followed a series of opinions by Justice Fields. At first, the "soundness" of the "position, that corporations are persons within the meaning of the clause in question" was "admitted" by the court upon the authority of the *Santa Clara County* case, *supra.* See *Minneapolis and St. Louis R. Co. v. Beckwith*, 129 U.S., 26, 32 L.ed., 585, 9 S.Ct., 207.

Next—it was said that "Private corporations are persons within the meaning of the amendment; it has been so held in several cases by this court * * *" and the court was again relying primarily upon the *Santa Clara County* case, *supra.* See *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U.S., 386, 35 L.ed., 1051, 12 S.Ct., 255.

Finally, it was stated by Justice Brewer in 1897:

"It is well settled that corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States. * * *"

And in making this statement, principal reliance was again upon the *Santa Clara* case, *supra.* See *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S., 150, 41 L.ed., 666, 17 S.Ct., 255.

Thus, in the space of eleven years, a proposition announced, without argument, became "well settled," and all by reliance upon the original, unargued case. So the present position is that corporations are not citizens but are persons. When this is applied to foreign corporations admitted to do business in a state other than that in which originally created, it results in a most peculiar

concept. In brief, a state is not required to admit a foreign corporation at all, but if it does, it must thereafter extend "equal protection," unless it has conditioned the admission (see *Lincoln National Life Ins. Co. v. Read*, 325 U.S., 673, 89 L.ed., 1861, 65 S.C:., 1220), in which event it may not discriminate against the admitted corporation for the initial period for which admitted but may thereafter refuse altogether to allow continuance of business in the state.

This position is self contradictory. It denies a state a right to discriminate unless as a condition to admission it reserves the right to the ultimate discrimination, i.e., complete and arbitrary refusal of continued admittance or, in reality, expulsion. Furthermore, the general position itself is sometimes found to be so unrealistic as to contribute to gross injustice and is therefore ignored. See *Venice Hunting & Trapping Co. v. Salinovich*, 10 F.2d, 222.

It is submitted that the time has come to recognize certain fundamental facts, dictated by basic logic:

First, the word "persons" was used in the Equal Protection Clause of the Fourteenth Amendment because it was recognized that there were many people in this country who were neither native born nor naturalized.

Second, a corporation is not a person, except to the extent that it is made so by the state which creates it, or, in the case of foreign corporations, to the extent made so by a state which admits it to do business within its jurisdiction.

Third, in creating or admitting a corporation, a state may, for special purposes, endow it with rights superior to those of individual citizens.

Fourth, to the extent that a corporation may be created or admitted into a state to exercise those rights which



citizens may exercise, it may be made a person and in that capacity entitled to equal protection. However, to the extent that a corporation may be created or admitted to exercise rights superior to those which a citizen may exercise, it is in fact superior to a "person" and when claiming to exercise rights peculiar to that capacity it is not a "person" within the scope of the Fourteenth Amendment to the Constitution.

## CONCLUSION

The Ohio taxing system as applied to the appellant does not, when viewed in its entirety, violate the Fourteenth Amendment to the Constitution of the United States. Ohio does not exempt domestic insurance companies from *ad valorem* taxes while taxing foreign insurance companies. Ohio does substitute within its franchise tax structure so that the franchise tax paid by domestics is *in lieu* of an *ad valorem* tax on their personal property. However, when viewed in its entirety, the aggregate result is not an unreasonable discrimination against the appellant herein. Appellant's objection runs primarily to the mode employed by Ohio in making this distinction, a distinction which Ohio has a constitutional right to make. It is respectfully submitted that when viewed as an entirety both the system of taxation and the results thereof, in Ohio, are within the scope of constitutional action under the Fourteenth Amendment, as defined by decisions of this court. Such being the case, the appellant herein cannot prevail. It may have preferred to see Ohio employ a different mode or manner to arrive at the same result, but this is not a basis for declaring a statute unconstitutional. Finally, the appellant is engaged in a business which is peculiar to corporations, a business which individual persons cannot pursue in Ohio. Appellant in this instance is, therefore, not a person within the scope of the Equal Protection Clause of the Fourteenth Amendment to the Con-

stitution. Consequently, the decision appealed from should be affirmed.

Respectfully submitted,

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*Assistant Attorney General,*
*Attorneys for Appellee.*



## LIST OF PARTIES

Metropolitan Life Insurance Company
The Prudential Insurance Company of America
The Prudential Property and
Casualty Insurance Company
The Equitable Life Assurance Society
of the United States
New York Life Insurance Company
The Mutual Life Insurance Company of New York
John Hancock Mutual Life Insurance Company
The Paul Revere Life Insurance Company
The Paul Revere Variable Annuity Insurance Company
State Mutual Life Assurance Company of America
Massachusetts Bay Insurance Company
Hanover Insurance Company
The Travelers Insurance Company
The Travelers Indemnity Company
The Phoenix Insurance Company
The Charter Oak Fire Insurance Company
The Travelers Indemnity Company of America
The Travelers Indemnity Company of Rhode Island
Industrial Indemnity Company
International Insurance Company
United States Fire Insurance Company
The North River Insurance Company
Hartford Fire Insurance Company
Hartford Accident and Indemnity Company
Twin City Fire Insurance Company
Hartford Life and Accident Insurance Company
Hartford Casualty Insurance Company
Hartford Life Insurance Company
Hartford Variable Annuity Life Insurance Company
Connecticut Mutual Life Insurance Company
Transamerica Occidental Life Insurance Company
Massachusetts Mutual Life Insurance Company
Aetna Life Insurance Company
The Aetna Casualty and Surety Company
Aetna Life Insurance and Annuity Company

The Automobile Insurance Company of
Hartford, Connecticut
The Standard Fire Insurance Company
W.G. Ward, Jr. as Commissioner of Insurance of the
Department of Insurance of the State of Alabama
American Educators Life Insurance Company
Booker T. Washington Life Insurance Company
Federated Guaranty Life Insurance Company
Liberty National Life Insurance Company
Southern United Life Insurance Company



## TABLE OF DOMESTIC PREFERENCE STATES

Category 1: Differential Premiums Tax Rates

| | |
|---|---|
| Alabama | Nebraska |
| Alaska | North Carolina |
| Arizona | Tennessee |
| Hawaii | Texas |
| Kansas | Washington |
| Maine | Wyoming |
| Mississippi | |

Category 2: Differential Tax Bases

| | |
|---|---|
| Arkansas | Michigan |
| Florida | Ohio |
| Illinois | Oklahoma |
| Indiana | Oregon |
| Kentucky | South Carolina |

Category 3: Other Forms of Discrimination

| | |
|---|---|
| Colorado | Nevada |
| Georgia | New Mexico |
| Idaho | South Dakota |
| Louisiana | West Virginia |
| Montana | |

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Ark. Stat. Ann. § 66-2302(1)-(2) (Supp. 1983)
Colo. Rev. Stat. § 10-3-209(1)(b)(I)-(II), d(III) (1973)
Fla. Stat. Ann. §§ 624.509, 624.510, 624.512, 624.514 (West Supp. 1983)
Ga. Code Ann. § 33-6-5 (Supp. 1982)
Hawaii Rev. Stat. § 431-318 (1976 & Supp. 1982)

Idaho Code §§ 41-402, 41-403 (Supp. 1963)
Ill. Rev. Stat. ch. 73, ¶ 1021, § 409, ¶ 1025, § 413 (1961)
Ind. Code §§ 6.2.1-2-3(b), 6.2.1-3-8, 27-1-18-2 (1962 & Supp. 1963)
Kan. Stat. Ann. § 40-252(A), (D) (1961)
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La. Rev. Stat. Ann. § 22:1068 (West Supp. 1963)
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Neb. Rev. Stat. §§ 77-908, 77-909, 81-523 (1961)
Nev. Rev. Stat. § 680B.050 (1963)
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N.C. Gen. Stat. § 105-228.5 (1979 & Supp. 1963)
Ohio Rev. Code Ann. §§ 5725.18, 5729.03 (Page 1971 & Supp. 1963)
Okla. Stat. Ann. tit. 36, §§ 624(A)(2), 624(B), 625, tit. 68, § 2355(c) (West 1976 & Supp. 1963-1964)
Ore. Rev. Stat. §§ 317.070, 731.816(1)-(2) (1961)
S.C. Code Ann. §§ 38-5-320, 38-5-330, 38-5-340, 38-5-350, 38-5-380, 38-5-410, 38-5-420 (Law. Co-op. Cum. Supp. 1963)
S.D. Codified Laws §§ 10-44-2, 10-44-4, 10-44-5 (1962)
Tenn. Code Ann. §§ 56-4-205, 56-4-210(a) (1980 & Supp. 1963)
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Wash. Rev. Code Ann. § 48.14.020 (Supp. 1963-1964)
W. Va. Code § 33-3-14c (Supp. 1963)
Wyo. Stat. §§ 26-4-103(b), 26-4-104 (1963)

# SUPPLEMENTAL APPENDIX

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No. 83-1274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
*Appellants,*

v.

W. G. WARD, JR., *et al.*,
*Appellees.*

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**On Appeal from the Supreme Court of Alabama**

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## SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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## LIST OF CORPORATE PARENTS, SUBSIDIARIES AND AFFILIATES OF APPELLANTS[1]

Metropolitan Life Insurance Company
(No partially-owned subsidiaries or affiliates)

The Prudential Insurance Company of America

Partially-owned subsidiaries or affiliates:
Essex Syndicate, Inc.
John Street Syndicate, Inc.

The Prudential Property and Casualty Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Company:
The Prudential Insurance Company of America

The Equitable Life Assurance Society of the United States

Partially-owned subsidiaries or affiliates:
Equitable Life Leasing Corporation

New York Life Insurance Company
(No partially-owned subsidiaries or affiliates)

Mutual Life Insurance Company of New York
(No partially-owned subsidiaries or affiliates)

John Hancock Mutual Life Insurance Company

Partially-owned subsidiaries or affiliates:
Hancock/Dilkewood Services, Inc.
Ameriplan Health Systems, Inc.
Hanseco Insurance Company

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[1] This list does not include foreign subsidiaries and affiliates. A listing containing such subsidiaries and affiliates can be made available upon request. The list also does not include wholly-owned affiliates.

The Paul Revere Life Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
AVCO Financial Services International, Inc.
AVCO Financial Services, Inc.
The Paul Revere Corporation
AVCO Corporation

The Paul Revere Variable Annuity Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
The Paul Revere Life Insurance Company
AVCO Financial Services International, Inc.
AVCO Financial Services, Inc.
The Paul Revere Corporation
AVCO Corporation

State Mutual Life Assurance Company of America

Partially-owned subsidiaries or affiliates:
Hanover Insurance Company

Massachusetts Bay Insurance Company (No partially-owned subsidiaries or affiliates)

Parent Companies:
Hanover Insurance Company
State Mutual Life Assurance Company of America

Hanover Insurance Company

Parent Company:
State Mutual Life Assurance Company of America

Partially-owned subsidiaries or affiliates:
Beacon Insurance Company of America
California Compensation & Fire Company



The Travelers Insurance Company
The Travelers Indemnity Company
(No partially-owned subsidiaries or affiliates)

Parent Company:
The Travelers Corporation

The Phoenix Insurance Company
The Charter Oak Fire Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
The Travelers Indemnity Company
The Travelers Corporation

The Travelers Indemnity Company of America
The Travelers Indemnity Company of Rhode Island
(No partially-owned subsidiaries or affiliates)

Parent Companies:
The Phoenix Insurance Company
The Travelers Indemnity Company
The Travelers Corporation

Industrial Indemnity Company
International Insurance Company
United States Fire Insurance Company
The North River Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
Crum and Forster, Inc.
Xerox Corporation

Hartford Fire Insurance Company

Parent Company:
International Telephone & Telegraph Corporation

Partially-owned subsidiaries or affiliates:
Piper Jaffray Incorporated
WFS Financial Corporation
Wilton, Suiter & Co.

Twin City Fire Insurance Company
Desert American Agency
Redshaw, Inc.
Adapt, Inc.
Lundberg & Associates Insurance Agency, Inc.
William E. Shimer Bond General Agency, Inc.

Hartford Accident and Indemnity Company

Parent Companies:
Hartford Fire Insurance Company
International Telephone & Telegraph Corporation

Partially-owned subsidiaries or affiliates:
Redshaw, Inc.
Adapt, Inc.
Lundberg & Associates Insurance Agency, Inc.
William E. Shimer Bond General Assembly, Inc.

Twin City Fire Insurance Company

Parent Companies:
Hartford Fire Insurance Company
International Telephone & Telegraph Corporation

Partially-owned subsidiaries or affiliates:
Desert American Agency

Hartford Life and Accident Insurance Company

Parent Companies:
Hartford Fire Insurance Company
International Telephone & Telegraph Corporation

Partially-owned subsidiaries or affiliates:
WFS Financial Corporation

Hartford Casualty Insurance Company
New York Underwriters Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
Hartford Fire Insurance Company
International Telephone & Telegraph Corporation



Hartford Life Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
ITT Life Insurance Corporation
Hartford Life and Accident Insurance Company
Hartford Fire Insurance Company
International Telephone & Telegraph Corporation

Hartford Variable Annuity Life Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
Hartford Life Insurance Company
ITT Life Insurance Corporation
Hartford Life and Accident Insurance Company
Hartford Fire Insurance Company
International Telephone & Telegraph Corporation

Connecticut Mutual Life Insurance Company

Partially-owned subsidiaries or affiliates:
American Homestead Corporation
Leisure Communities, Inc.

Transamerica Occidental Life Insurance Company

Parent Companies:
Transamerica Insurance Corporation of California
Transamerica Corporation

Partially-owned subsidiaries or affiliates:
Transamerica International Insurance Services, Inc.
Direct Marketing International
Secured Development Co., Inc.

Massachusetts Mutual Life Insurance Company
(No partially-owned subsidiaries or affiliates)

Aetna Life Insurance Company

Parent Company:
Aetna Life and Casualty Company

Partially-owned subsidiaries or affiliates:
CS Development Corporation

The Aetna Casualty and Surety Company

Parent Company:
Aetna Life and Casualty Company

Partially-owned subsidiaries or affiliates:
Aegen International, Inc.

Aetna Life Insurance and Annuity Company

Parent Company:
Aetna Life and Casualty Company

Partially-owned subsidiaries or affiliates:
Aetna Income Shares, Inc.
Aetna Variable Fund, Inc.

The Automobile Insurance Company of Hartford, Connecticut
The Standard Fire Insurance Company
(No partially-owned subsidiaries or affiliates)

Parent Companies:
The Aetna Casualty and Surety Company
Aetna Life and Casualty Company

# MOTION

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(4)

No. 83-1274

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1983

METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,

*Appellants,*

v.

W. G. WARD, JR., *et al.*,

*Appellees.*

On Appeal from the Supreme Court of Alabama

## MOTION TO DISMISS OR AFFIRM

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March 26, 1984

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41 pp

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No. 83-1274

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1983

METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,

*Appellants,*

v.

W. G. WARD, JR., *et al.*,

*Appellees.*

On Appeal from the Supreme Court of Alabama

## MOTION TO DISMISS OR AFFIRM

Appellees, American Educators Life Insurance Company, Booker T. Washington Life Insurance Company, Federated Guaranty Life Insurance Company, Liberty National Life Insurance Company, and Southern United Life Insurance Company[1] respectfully move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Alabama on the ground that it is manifest that the questions on which the

[1]Pursuant to Rule 28.1 of the Rules of this Court, the corporate parents, subsidiaries and affiliates of the said Appellees are listed in the Appendix at 1a to 4a.

decision of this cause depend are so unsubstantial as not to need further argument.

## I. THE NATURE OF THE CASE CONSTITUTIONAL PROVISIONS AND STATUTES

Appellants are insurance companies whose States of incorporation and principal places of business are outside the State of Alabama. Appellants are classified as "foreign insurers" under the provisions of §§27-4-1 (2) and 27-4-4, Ala. Code (1975).[1] Insurance companies which are organized under the laws of the State of Alabama and which maintain their principal offices and chief places of business in the State of Alabama are classified as domestic insurers under the provisions of §§27-4-1 (3) and 27-4-5. Domestic insurers are subject to a lower premium tax rate than are foreign insurers pursuant to these statutes. Pertinent provisions of the Alabama Code are set forth in the Appendix to Appellants' Jurisdictional Statement (hereinafter "Juris. State. App.") at 29a to 57a.

Appellants filed Notices of Appeal to the Circuit Court of Montgomery County, Alabama from the refusal of the Alabama Commissioner of Insurance (hereinafter "Commissioner") to grant them a refund of premium taxes paid based on Appellants' allegation that the premium tax statute was unconstitutional. Therein, the Appellants alleged that as "foreign insurers" they were unconstitutionally required to pay a premium tax at a higher rate than domestic insurers and that, therefore, §§27-4-4 and 27-4-5 unconstitutionally violated the Equal Protection guarantees of the United States Constitution because they differentiate between foreign and domestic insurers. The pertinent provision of the Fourteenth Amendment to the United States

[1]Unless noted to the contrary, all code citations refer to Ala. Code (1975).



Constitution is set forth on page 29a of the Appendix to Appellants' Jurisdictional Statement. The thirty-nine separate suits of Appellants before the trial court were consolidated.

Appellees American Educators Life Insurance Company, Booker T. Washington Life Insurance Company, Federated Guaranty Life Insurance Company, Liberty National Life Insurance Company, and Southern United Life Insurance Company (hereinafter collectively referred to as "Appellee/Intervenors"), domestic insurers under the subject statutes, filed a motion to intervene as defendants. The motion was granted.

Appellants, Commissioner, and Appellee/Intervenors filed cross motions for summary judgment in two of the thirty-nine cases. The parties agreed that the decision regarding the two cases would be dispositive of the remaining cases. Affidavits were filed in support of each and the motions were argued orally.

The trial court entered judgment in favor of Commissioner and Appellee/Intervenors finding that the challenged legislation had legitimate purposes and that it was reasonable for the Alabama Legislature to believe that the differentiation between foreign and domestic insurers would promote those purposes. Juris. State. App. at 15a to 22a.

Appellants filed a Motion for New Trial or, in the Alternative, Motion to Amend or Vacate the Judgment and a separate Motion to Extend the Findings of Facts. The motions were denied. An appeal was taken to the Alabama Court of Civil Appeals. The appellate court affirmed the trial court's ruling on the legitimate state purpose issue, but remanded the case for an evidentiary hearing on the rational relationship issue on the grounds that conflict in the

evidence below rendered summary judgment inappropriate. Juris. State. App. at 4a to 12a. [4]

Commissioner and Appellee/Intervenors petitioned the Alabama Supreme Court for review of the remand order. Appellants petitioned for review of the legitimate state purpose issue. On September 23, 1983 the Supreme Court of Alabama denied all the petitions for certiorari. Thereafter Appellants waived their right to a hearing and joined in a joint motion with all other parties seeking a rehearing and the entry of a final judgment. The motion was granted on November 10, 1983. Juris. State. App. at 2a to 3a.

Appellants appeal from the final judgment of the Supreme Court of Alabama holding that §27-4-4 does not violate the Fourteenth Amendment to the Constitution of the United States. Jurisdictional Statement at 1.

## II. ARGUMENT

### A. The Case Presents No Substantial Question Not Previously Decided By This Court.

Fortunately, this Court recently enunciated the test to apply in evaluating an Equal Protection challenge to the constitutionality of a statute which taxes foreign insurers at a higher rate than domestic insurers. The test was properly applied by the Alabama Supreme Court in its holding that the subject taxing statute does not violate the Fourteenth Amendment. No substantial federal question, therefore, is presented on this appeal.

The test is set forth in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 68 L.Ed.2d 514, 101 S. Ct. 2070 (1981). All parties agree this decision is controlling in the instant case. In *Western & Southern* the constitutional validity of a California statute which required certain foreign insurers to pay a higher rate



of premium tax than domestic insurers was challenged.[5] In evaluating the constitutionality of this retaliatory tax this Court noted:

> Ordinarily, there are three provisions of the Constitution under which a taxpayer may challenge an allegedly discriminatory state tax: the Commerce Clause . . . ; the Privileges and Immunities Clause of Article IV, §2 . . . ; and the Equal Protection Clause . . . . This case assumes an unusual posture, however, because the Commerce Clause is inapplicable to the business of insurance . . . and the Privileges and Immunities Clause is inapplicable to corporations. . . . *Only the Equal Protection Clause remains as a possible ground for the invalidation of the California tax.*

451 U.S. at 656 (Citations omitted) (Emphasis added).

The decision to remove the restrictions of the Commerce Clause from consideration in *Western & Southern* was discussed in detail. This Court held that although the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce, Congress may confer upon the States an ability to restrict the flow of interstate commerce; and that "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." 451 U.S. at 652-53. This Court noted that all Commerce Clause limitations on the States' authority to regulate and tax the business of insurance were removed when Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§1011 - 1015. *Id.* The impact on interstate commerce of a tax which differentiates between foreign and domestic insurers, therefore,

[5] The California retaliatory tax resulted in certain foreign insurers being subjected to a higher rate of premium tax than domestic insurers if the premium tax rate in the foreign insurer's home state exceeded California's rate. 451 U.S. at 648.

is not germane to the question of the constitutionality of the taxing statutes at issue.

Thereafter, this Court in *Western & Southern* recognized prior inconsistent U.S. Supreme Court decisions regarding the constitutional standards for evaluating legislation which differentiates between domestic and foreign corporations. To relieve the existing "tension" – *i.e.*, the irreconcilable differences between the previous decisions, the standard now to be used in determining whether taxes which differentiate between domestic and foreign corporations violate the Equal Protection Clause was enunciated as follows:

> We consider it now established that, whatever the extent of the State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, *unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.*

451 U.S. at 667-68 (Emphasis added).

This Court expanded on the minimum scrutiny test of rationality stating:

> In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose?, and (2) Was it reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose?

451 U.S. at 668.

Hence, contrary to the Appellants' pleas, there is no doubt that a State may impose more "onerous taxes" on foreign insurers if "the discrimination between foreign and domestic corporations bears a rational relation to a legiti-



mate state purpose." 451 U.S. at 668. To the extent the cases preceding *Western & Southern* place a greater burden on the States, they were overruled by implication in *Western & Southern*.[6]

In describing the basic prohibition of the Fourteenth Amendment, the *Western & Southern* opinion provided:

> The Fourteenth Amendment forbids the States to 'deny to any person within [their] jurisdiction equal protection of the laws' but does not prevent the States from making reasonable classifications among such persons.

451 U.S. at 656-57 (Citations omitted). The decisions of this Court in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 35 L.Ed.2d 351, 93 S. Ct. 1001 (1973) and *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 3 L.Ed.2d 480, 79 S. Ct. 437 (1959), cited in support of that proposition, also discussed the standards by which classifications of taxpayers are scrutinized under the Equal Protection Clause.

In *Lehnhausen*, an Ohio corporation challenged a provision of the Ohio constitution which prohibited the State from enacting personal property taxes against individuals, but which allowed such taxes to be assessed against, *inter alia*, corporations. In sustaining the difference in treatment, the *Lehnhausen* Court relied upon *Madden v. Kentucky*, 309 U.S. 83, 84 L.Ed. 590, 60 S. Ct. 406 (1940). In *Madden*, Plaintiffs made an Equal Protection challenge to a Kentucky statute which imposed a larger annual ad valorem tax on deposits by residents in banks outside the

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[6]*Some of the cases so considered were Southern R. Co. v. Greene*, 216 U.S. 400, 54 L.Ed. 536, 30 S. Ct. 287 (1910); *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494, 71 L.Ed. 372, 47 S. Ct. 179 (1926); and *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 93 L.Ed. 1544, 69 S. Ct. 1291 (1949). The foreign insurers rely heavily on these cases. Jurisdictional Statement at 8 - 10.

State than was imposed on those bank deposits within the State. In sustaining the tax provisions, this Court wrote:

> It has, because of this, been pointed out that *in taxation*, even more than in other fields, *legislatures possess the greatest freedom of classification*. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *The burden is on the one attacking* the legislative arrangement *to negative every conceivable basis* which might support it.

309 U.S. at 88 (Emphasis added).

*Allied Stores* involved an Ohio statute which required residents to pay ad valorem taxes on merchandise held in Ohio warehouses for storage only, while non-residents of the State were exempted from the provision. This Court upheld that classification providing: "[I]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." *Allied Stores*, 358 U.S. at 528. Indeed, if the rationality of the means to the legitimate end is even debatable, the legislature's judgment is to be affirmed and the challenger's attack must fail.[9] *Western & Southern*, 451 U.S. at 674; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 at 464, 66 L.Ed.2d 659, 101 S. Ct. 715, *reh. denied*, 450 U.S. 1057, 68 L.Ed.2d 222, 101 S. Ct. 1755 (1981).

In summary, this Court has prescribed that an equal protection challenge to a taxing statute which differentiates between foreign and domestic insurers must fail if (1) there is a conceivable legitimate purpose for which the statute may have been enacted; and (2) if the lawmakers could have reasonably believed that the use of the challenged classification would promote that purpose. The burden is upon those challenging the classification to negative every conceivable basis which might support it and to demonstrate that it would have been irrational for the legislature to believe that the subject statute could have accomplished any of the possible legitimate purposes. This standard was applied by the Alabama courts. Appellants simply failed to carry the burden required by this Court.

[9] This is exactly the standard which the Alabama Supreme Court recognizes. *Edgerton v. Gulas Wrestling Enterprises, Inc.*, 406 So.2d 966 (Ala. 1981); *Thorn v. Jefferson County*, 375 So.2d 780 (Ala. 1979).



### B. Statute Has Legitimate Purposes.

The trial court held that at least two legitimate State purposes are apparent from reading the statute, stating:

> A review of the statute on its face, reveals *at least* two purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute. Under the *Western & Southern* analysis, this Court finds these purposes to be legitimate. The evidence submitted also establishes the existence of *at least* these purposes.

Juris. State. App. at 20a to 21a. (Emphasis added). The Alabama Court of Civil Appeals concurred and the Alabama Supreme Court affirmed the trial court's conclusions. Juris. State. App. at 2a to 3a and 9a. The legitimacy of both of these purposes has been consistently endorsed by this Court.

**1. Encouraging Domestic Industry a Legitimate Purpose.**

For instance in *Allied Stores, supra*, this Court upheld the constitutionality of an Ohio statute which exempted from taxation merchandise and agricultural products belonging to a nonresident if held in an Ohio warehouse for storage only, stating:

> [I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment.
>
> . . . .
>
> [I]t is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy. . . . Other similar purposes reasonably may be conceived. Therefore, we cannot say the discrimination was . . . not founded upon a reasonable distinction or difference in state policy or that no state of facts can be conceived to sustain it.

358 U.S. at 528-29. It cannot be said that encouraging the location of or formation of insurance companies in Alabama is any less legitimate than encouraging the location of warehouses in Ohio.

In like manner, this Court in *Parker v. Brown*, 317 U.S. 341, 87 L.Ed. 315, 63 S. Ct. 307 (1943), in rejecting a Commerce Clause challenge to a California statute which regulated the marketing of California's raisin crop, provided that enhancing the ability of a local industry to operate profitably is a legitimate State interest,[6] stating:

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[6]For other decisions of this Court recognizing the legitimacy of a state's interest in promoting local industry see, e.g., *Pike v. Bruce Church, Inc.*,



> [The] production and marketing of raisins presents a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries.

317 U.S. at 363.

**2. Encouraging Investment in Alabama a Legitimate Purpose.**

The trial court's conclusion that another legitimate purpose for the subject statute was to encourage capital investment by foreign insurers in Alabama investments also was proper. Section 27-4-4 (c) defines "Alabama investments". Juris. State. App. at 31a to 35a. As discussed *supra* this Court has consistently held it is legitimate for a State to promote the formation of and location of facilities or companies within its borders by discriminating between foreign and domestic corporations. Moreover, in *Western & Southern* it was noted: "This Court has recognized the legitimacy of state efforts to maintain the profit level of a domestic industry. . . ."[9] 451 U.S. at 671. Seeking the location of and formation of industries within a State and maintaining the profit margin of domestic industries are purposes which legitimately may be pursued by differentiating between foreign and domestic corporations. This directly results in investment in local assets. It must be concluded, therefore, that attempts to attract investments in Alabama investments are constitutionally permissible.

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307 U.S. 157, 23 L.Ed.2d 174, 90 S. Ct. 844 (1970); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 81 L.Ed. 1245, 57 S. Ct. 868 (1937). State courts have also concluded that a state may legitimately promote its local industry by favoring domestic corporations over foreign corporations. *See, e.g., Gulesburg Const. Co. v. Board of Trustees*, 641 P.2d 745 (Wyo. 1982); *United Bldg. & Constr. Trades Council v. Camden*, 88 N.J. 317, 443 A.2d 148 (1982); *Equitable Shipyards v. State*, 93 Wash.2d 465, 611 P.2d 388 (1980); *State v. Investors Diversified Services*, 113 Minn. 256, 70 N.W. 220 (1917).

[9]*Parker v. Brown*, 317 U.S. 341, 350-67, 87 L.Ed. 315, 63 S. Ct. 307 (1943) was cited in support of this proposition.

### 8. Other Conceivable Purposes.

In addition to the legitimate purposes noted by the Alabama Courts, there exist numerous other conceivable legitimate purposes for which the subject statute may have been enacted. Appellee/Intervenors furnished the trial court with the following list of additional legitimate purposes which the Alabama Legislature conceivably could have had in mind at the time it passed the subject statute. Appendix at 16 to 17a:

1. To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on equal footing with well-established, out-of-state companies.

2. To extend the range of customer choice among alternative insurance companies.

3. To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies, thereby making the insurance market more competitive.

4. To reduce the barriers to entry into the insurance industry.

5. To encourage more insurance to be sold in Alabama.

6. To promote a greater level of average insurance coverage per family in Alabama.

7. To enhance the use of insurance for Alabama families.

8. To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, financial losses, and other such calamities as may render debilitating financial losses. Such protection lessens



the burden that calamities might otherwise impose on state and local governments and thus on Alabama taxpayers.

9. To promote the greater use of insurance of all types in rural and sparcely populated sections of Alabama; market segments which usually are ignored by large, foreign companies.

10. To promote the growth and development of a domestic insurance industry.

11. To lessen the adverse impact which foreign insurance companies have on the economy of Alabama by channeling the premiums collected in Alabama to investments and purposes outside the State.

12. To encourage domestic insurance companies to keep their home offices in Alabama.

Doubtlessly, any of these purposes are legitimate for States to pursue.

## C. Reasonable Belief Statute Promotes Purposes.

The second part of the two-pronged test announced in *Western & Southern* is whether the State Legislature reasonably could have believed that the challenged statute would promote any of the conceivable legitimate state purposes. This Court further explained this standard stating: "[W]hether in fact the [statute] will accomplish its objective is not the question: the Equal Protection Clause is satisfied if we conclude that the California legislature *rationally could have believed* that the retaliatory tax would promote its objective." 451 U.S. at 671-72 (Emphasis in original).

The issue of whether the Alabama Legislature reasonably could have believed that the premium tax differential would promote any of its conceivable legitimate purposes is to be resolved in favor of the constitutionality of the legislation if the issue "is at least debatable". *Western &*

*Southern*, 451 U.S. at 674. Moreover, "[T]hose challenging the legislative judgment must convince the court that the legislative facts upon which the classification is *apparently* based *could not reasonably* be conceived to be true by the governmental decisionmaker." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 at 464, 66 L.Ed.2d 659, 101 S. Ct. 715, *reh. denied*, 450 U.S. 1027, 68 L.Ed.2d 222, 101 S. Ct. 1735 (1981) (Emphasis added).

Appellants failed to carry this burden. Indeed, far from removing the issue from the field of debate, the Alabama Court of Civil Appeals specifically held this factual question remained unresolved — *i.e.*, the issue remained "debatable". Juris. State. App. at 12a. Appellants subsequently waived their right to a further evidentiary hearing. As Appellants failed to carry this burden, the entry of judgment in favor of Appellees was correct.

Additionally, a mere reading of the statutes at issue confirms the decisions of the courts below that the Alabama Legislature reasonably could have believed that the statutes *at least* would promote the legitimate interests of (1) encouraging investment by foreign insurers in Alabama assets and (2) encouraging the formation of insurance companies in Alabama. Juris. State. App. at 21a. For instance, paragraph (b) of §27-4-4, the section setting forth the premium tax on foreign insurers, provides that a foreign insurer may reduce the rate at which its premiums are taxed according to the percentage of the insurer's assets which are invested in Alabama investments. Certainly, a statute which gives a taxpayer the incentive to *reduce* the revenues it pays by investing in Alabama investments must have at least one legitimate purpose. Could it be "encouraging capital investment by foreign insurance companies in . . . Alabama assets . . ." as held by the trial court? Juris. State. App. at 21a. Logic demands such a conclusion. Appellants' protestations that such investments never permit an equalization of the taxes on foreign and domestic insurers[6] simply beg the question before the Court.



Furthermore, an insurance company is defined as a "domestic insurer" and thereby pays the lower premium tax rate if it is "organized under the laws of the State of Alabama [and] maintains its principal office and chief place of business in the State of Alabama." §27-4-1(3). Would this tend to encourage "the formation of new insurance companies in Alabama . . ." as the trial court held? Logic again requires such a conclusion; hence, a second legitimate purpose.

This Court certainly may take judicial notice that a legislature which offers tax incentives which reward certain actions by a taxpayer can reasonably believe that the passage of the statute would promote such actions. Hence, the language of the subject statutes supports the conclusion of the trial court that the Alabama Legislature reasonably could have believed that the statutes would promote the two legitimate interests noted above. The judgment of the Alabama Supreme Court, therefore, is due to be affirmed or this appeal dismissed.

Finally, this Court in *Western & Southern* wisely provided that:

> [W]hether *in fact* the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if the California Legislature *rationally could have* believed that the retaliatory tax would promote its objective. (Citations omitted).

451 U.S. at 671-72 (Emphasis in original). This Court further noted: "[T]he courts are not empowered to second-guess the wisdom of state policies. (Citations omitted)

[6]Jurisdictional Statement at 14.

Our review is confined to the *legitimacy* of the purpose." 451 U.S. at 670 (Emphasis in original).

The test of the challenged legislation's legitimacy, therefore, is not whether the differentiation is good policy. It is not whether the legislature used the best method of achieving its purpose. It is not whether the legislature could have or should have done more to achieve its purpose. Rather, the test is simply whether the Alabama Legislature rationally could have believed that the premium tax differentiation would promote any of the conceivable purposes. This burden has been met.

Therefore, as this Court has previously promulgated the test to be applied in an Equal Protection challenge to a taxing statute which differentiates between foreign and domestic insurers, and as that standard was properly applied by the Alabama courts, it is respectfully submitted that no substantial federal question is presented by Appellants and jurisdiction should not be assumed.



## III. CONCLUSION

WHEREFORE, Appellee/Intervenors respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument. Thus, Appellee/Intervenors move this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Alabama.

Respectfully submitted,

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(Counsel of record)
Harry Cole
Hill, Hill, Carter, Franco,
Cole & Black
P.O. Box 116
Montgomery, Alabama 36195
(205) 834-7600

March 26, 1984

# APPENDIX

## LIST OF CORPORATE PARENTS, SUBSIDIARIES AND AFFILIATES OF APPELLEE/INTERVENORS

*American Educators Life Insurance Company*

Parent Companies:
- American Educators Financial Corporation
- American Plan Corporation

Partially-owned subsidiaries or affiliates:
- American Educators Agency, Inc.
- American Educators Life Insurance Company of North Carolina

*Booker T. Washington Life Insurance Company*

Parent Company:
- A. G. Gaston Corporation

Partially-owned subsidiaries or affiliates:
- Booker T. Washington Broadcasting Service, Inc.
- A. G. Gaston Home for Senior Citizens, Inc.
- Vulcan Realty and Investment Corp., Inc.
- Smith and Gaston Funeral Directors, Inc.
- M&G Public Relations, Inc.
- New Grace Hill Cemetery
- Peoples Insurance Co.
- Pilgrim Health & Life Insurance Company
- Johnson Allen Undertaking Company
- Unity Life Insurance Company of Mobile
- Gaston Garden

*Federated Guaranty Life Insurance Company*

Parent Companies:
- Alabama Farm Bureau Mutual Casualty Insurance Company, Inc.
- Federated Guaranty Corporation

Partially-owned subsidiaries or affiliates:
Federated Guaranty Co., Inc.
Federated Guaranty General Insurance Co., Inc.
Federated Guaranty Financial Corporation
Federated Guaranty Financial Corporation of Alabama

*Liberty National Life Insurance Company*

Parent Companies:
Globe Life and Accident Insurance Company
Torchmark Corporation

Partially-owned subsidiaries or affiliates:
United American Insurance Company
Torch Energy Corporation
Torch Energy Corporation of Texas
American Life and Accident Insurance Company
Globe International Life Insurance Company
Globe Life and Accident Insurance Company of Oklahoma, Inc.
Liberty National Reinsurance Company, Ltd.
Liberty International Reinsurance Company, Ltd.
Waddell & Reed, Inc.
Waddell & Reed Asset Management Company
Unicom Agency, Inc.
Waddell & Reed Services Company
LibFin Company
LIBNAT Corporation
Liberty Real Estate Corporation
Torchmark Securities Corporation
TMK Leasing Corporation
TMK Leasing Company
CMI Corporation
Liberty National Insurance Corporation



Liberty Management Services Company
Torchmark Brokerage Services
CMI Lease Services Company
CMI Leasing Corporation
CMI Sales, Inc.
CMI Equipment Sales Corporation
CMI Aircraft Corporation
Troy Investment Company
CMI Financial Services, Inc.
CMI Equipment Corporation
Cherney Mills, Inc.
CMI, S.A.
CMI France, S.A.
CMI Deutschland GmbH
Emerald Transportation Services Corporation
International Financial Services, Inc.
International Financial Services Capital Corporation
International Financial Services Life Insurance Company
Money Concepts International, Inc.
National Group Services Corporation
International Investment and Insurance, Ltd.
Chatham Financial Associates, Inc.
Dixie Express, Inc.
J. Gordon Gaines, Inc.
J. Gordon Gaines Insurance Services, Inc.
Neil Wiley Insurance Services, Inc.
Shelco, Inc.
Sheffield Insurance Company -- Rhode Island
The Keep, Inc.
Sheffield Insurance Company -- Georgia
Brown-Service Funeral Homes Co., Inc.
CMI Management Sales Corporation
Evaluation Associates, Inc.

Evaluation Associates Investment Management Company
Fiduciary Trusts Company of New Hampshire
Liberty National Fire Insurance Company
Torchmark Financial Service Company
Torchmark Financial Services, Inc.
Torchmark Leasing Programs, Inc.
United Investors Equity Service, Inc.
United Investors Life Insurance Company

*Southern United Life Insurance Company*

(No partially-owned subsidiaries or affiliates)



IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

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| METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation, | CIVIL ACTION NO. CV-81-994-Th |
| THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a mutual life insurance company organized under the laws of the State of New Jersey, | CIVIL ACTION NO. CV-81-995-Th |
| THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation, | CIVIL ACTION NO. CV-81-996-Th |
| THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation, | CIVIL ACTION NO. CV-81-997-Th |
| NEW YORK LIFE INSURANCE COMPANY, a New York Corporation, | CIVIL ACTION NO. CV-81-998-Th |
| MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a New York corporation, | CIVIL ACTION NO. CV-81-999-Th |
| JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation, | CIVIL ACTION NO. CV-81-1000-Th |
| THE PAUL REVERE LIFE INSURANCE COMPANY, a Massachusetts corporation, | CIVIL ACTION NO. CV-81-1001-Th |

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| THE PAUL REVERE VARIABLE ANNUITY INSURANCE COMPANY, a Massachusetts corporation, | CIVIL ACTION NO. CV-81-1002-Th |
| STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a Massachusetts corporation, | CIVIL ACTION NO. 81-CV-1003-Th |
| MASSACHUSETTS BAY INSURANCE CORPORATION, a Massachusetts corporation, | CIVIL ACTION NO. CV-81-1004-Th |
| HANOVER INSURANCE COMPANY, a New Hampshire corporation, | CIVIL ACTION NO. CV-81-1005-Th |
| THE TRAVELERS INSURANCE COMPANY (ACCIDENT), a Connecticut corporation, | CIVIL ACTION NO. CV-81-1198-Th |
| THE TRAVELERS INSURANCE COMPANY (LIFE), a Connecticut corporation, | CIVIL ACTION NO. CV-81-1199-Th |
| INDUSTRIAL INDEMNITY COMPANY, a California corporation, | CIVIL ACTION NO. CV-81-1508-Th |
| INTERNATIONAL INSURANCE COMPANY, an Illinois corporation, | CIVIL ACTION NO. CV-81-1509-Th |
| UNITED STATES FIRE INSURANCE COMPANY, a New York corporation, | CIVIL ACTION NO. CV-81-1510-Th |



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| THE NORTH RIVER INSURANCE COMPANY, a New Jersey corporation, | CIVIL ACTION NO. CV-81-1511-Th |
| HARTFORD CASUALTY INSURANCE COMPANY, a New Jersey corporation, | CIVIL ACTION NO. CV-81-1348-Th |
| HARTFORD FIRE INSURANCE COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1349-Th |
| TWIN CITY FIRE INSURANCE COMPANY, a Minnesota corporation, | CIVIL ACTION NO. CV-81-1350-Th |
| HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1351-Th |
| HARTFORD LIFE AND ACCIDENT COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1352-Th |
| HARTFORD VARIABLE ANNUITY LIFE INSURANCE COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1353-Th |
| NEW YORK UNDERWRITERS INSURANCE COMPANY, a New York corporation, | CIVIL ACTION NO. CV-81-1354-Th |
| HARTFORD LIFE INSURANCE COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1355-Th |

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| THE TRAVELERS INDEMNITY COMPANY OF AMERICA, a Georgia corporation, | CIVIL ACTION NO. CV-81-1673-Th |
| THE PHOENIX INSURANCE COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1674-T |
| THE CHARTER OAK FIRE INSURANCE COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1675-T |
| CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1676-P |
| THE TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, a Rhode Island corporation, | CIVIL ACTION NO. CV-81-1677-G |
| TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, a California corporation, | CIVIL ACTION NO. CV-81-1678-Th |
| MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation, | CIVIL ACTION NO. CV-81-1679-H |
| THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation, | CIVIL ACTION NO. CV-81-1680-H |
| Plaintiffs, | |
| vs. | |



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| HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama, | |
| Defendant, | |
| AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation, | |
| Intervenors. | |

## LIST OF LEGITIMATE STATE PURPOSES OF ALABAMA'S DIFFERENTIAL PREMIUM TAX STATUTE AND OFFER OF PROOF RELATING THERETO

Come now Defendant/Intervenors and in response to this Court's February 19, 1982 Order requiring a list of legitimate State purposes of Alabama's differential premium tax statute, present to the Court the following legitimate State purposes:

1. Defendant/Intervenors adopt by reference as if specifically set forth herein the List of Legitimate State Pur-

poses proffered by Defendant, Tharpe Forrester, in that pleading entitled "List of Legitimate State Purposes of Alabama's Differential Premium Tax Policy and Offer of Proof Relating Thereto" filed with this Court on March 8, 1982, attached hereto.

2. To encourage domestic insurance companies to keep their home offices in Alabama.

3. To promote the availability of insurance of all types in all areas of the State of Alabama.

4. To encourage investments by foreign insurance companies within the State of Alabama.

Defendant/Intervenors intend to present testimony by recognized experts which will fully support each of these legitimate State purposes. Defendant/Intervenors further state that this testimony should be ready for presentation to the Court in approximately eight (8) weeks. Defendant/Intervenors respectfully request the opportunity to present and preserve this testimony for the record.

Respectfully submitted,

/s/ HARRY COLE

HARRY COLE

/s/ ROBERT W. BRADFORD, JR.

ROBERT W. BRADFORD, JR.

Attorneys for Defendant/Intervenors



IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

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| METROPOLITAN LIFE INSURANCE COMPANY, a New York Corporation, | CIVIL ACTION NO. CV-81-994-Th |
| THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a mutual life insurance company -- N.J., | CIVIL ACTION NO. CV-81-995-Th |
| THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey Corporation, | CIVIL ACTION NO. CV-81-996-Th |
| THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York Corporation, | CIVIL ACTION NO. CV-81-997-Th |
| NEW YORK LIFE INSURANCE COMPANY, a New York Corporation, | CIVIL ACTION NO. CV-81-998-Th |
| MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a New York Corporation, | CIVIL ACTION NO. CV-81-999-Th |
| JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Massachusetts Corporation, | CIVIL ACTION NO. CV-81-1000-Th |
| THE PAUL REVERE LIFE INSURANCE COMPANY, a Massachusetts Corporation, | CIVIL ACTION NO. CV-81-1001-Th |

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| THE PAUL REVERE VARIABLE ANNUITY INSURANCE COMPANY, a Massachusetts Corporation, | CIVIL ACTION NO. CV-01-1002-Th |
| STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, a Massachusetts Corporation, | CIVIL ACTION NO. CV-01-1005-Th |
| MASSACHUSETTS BAY INSURANCE COMPANY, a Massachusetts Corporation, | CIVIL ACTION NO. CV-01-1004-Th |
| HANOVER INSURANCE COMPANY, a New Hampshire Corporation, | CIVIL ACTION NO. CV-01-1005-Th |
| THE TRAVELERS INSURANCE COMPANY (ACCIDENT), a Connecticut Corporation, | CIVIL ACTION NO. CV-01-1198-Th |
| THE TRAVELERS INSURANCE COMPANY (LIFE), a Connecticut Corporation, | CIVIL ACTION NO. CV-01-1199-Th |
| INDUSTRIAL INDEMNITY COMPANY, a California Corporation, | CIVIL ACTION NO. CV-01-1508-Th |
| INTERNATIONAL INSURANCE COMPANY, an Illinois Corporation, | CIVIL ACTION NO. CV-01-1509-Th |
| UNITED STATES FIRE INSURANCE COMPANY, a New York Corporation, | CIVIL ACTION NO. CV-01-1510-Th |



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| THE NORTH RIVER INSURANCE COMPANY, a New Jersey Corporation, | CIVIL ACTION NO. CV-01-1511-Th |
| HARTFORD CASUALTY INSURANCE COMPANY, a New Jersey Corporation, | CIVIL ACTION NO. CV-01-1560-Th |
| HARTFORD FIRE INSURANCE COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-01-1565-Th |
| TWIN CITY FIRE INSURANCE COMPANY, a Minnesota Corporation, | CIVIL ACTION NO. CV-01-1550-Th |
| HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-01-1551-Th |
| HARTFORD LIFE AND ACCIDENT COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-01-1552-Th |
| HARTFORD VARIABLE ANNUITY LIFE INSURANCE COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-01-1553-Th |
| NEW YORK UNDERWRITERS INSURANCE COMPANY, a New York Corporation, | CIVIL ACTION NO. CV-01-1554-Th |
| HARTFORD LIFE INSURANCE COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-01-1555-Th |

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| THE TRAVELERS INDEMNITY COMPANY OF AMERICA, a Georgia Corporation, | CIVIL ACTION NO. CV-81-1673-Th |
| THE PHOENIX INSURANCE COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-81-1674-T |
| THE CHARTER OAK FIRE INSURANCE COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-81-1675-T |
| CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-81-1676-P |
| THE TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, a Rhode Island Corporation, | CIVIL ACTION NO. CV-81-1677-G |
| TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, a California Corporation, | CIVIL ACTION NO. CV-81-1678-Th |
| MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts Corporation, | CIVIL ACTION NO. CV-81-1679-H |
| THE TRAVELERS INDEMNITY COMPANY, a Connecticut Corporation, | CIVIL ACTION NO. CV-81-1680-H |
| Plaintiffs, | |
| Vs. | |



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|---|---|
| HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama, | |
| Defendant, | |
| AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation, | |
| Intervenors. | |

## LIST OF LEGITIMATE STATE PURPOSES OF ALABAMA'S DIFFERENTIAL PREMIUM TAX STATUTE AND OFFER OF PROOF RELATING THERETO

Now comes Defendant and in response to this Court's February 19, 1982 Order requiring a list of legitimate State purposes of Alabama's differential premium tax policy, presents to the Court the following legitimate State purposes:

1. To encourage the formation of new insurance companies domiciled within Alabama, thereby gaining the eco-

nomic benefits that the added job opportunities, employment, and payrolls can provide to the Alabama communities in which such headquarters facilities may be located.

2. To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on an equal footing with well-established, out-of-state companies. The existence of viable domestic insurance companies adds a new and important source of competition for large, nationally-known companies; having both foreign and domestic companies in vigorous competition with each other for customer patronage, makes the insurance marketplace more contestable and increases the likelihood that all insurance companies (both foreign and domestic) will have to provide more attractive rates and levels of service to the general public.

3. To extend the range of customer choice among alternative insurance companies. The existence of healthy, viable domestic insurance companies gives the general public a wider range of both companies and types of policies to choose from in selecting what kinds of insurance coverage and insurance service best suits their needs.

4. To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies.

5. To reduce the barriers to entry into the insurance industry.

6. To encourage more insurance to be sold in Alabama, with the result that more Alabama citizens gain access to the many benefits that adequate insurance protection provides.

7. To promote a greater level of average insurance coverage per family in Alabama.



8. To enhance the use of insurance by Alabama families.

9. To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, accidents, and other such calamities as may render them debilitating financial losses. To the extent that differential premium tax policies can be used to create a domestic insurance industry that, in turn, enhances competition in the property and casualty insurance industry in Alabama, then the more likely it is that Alabama families and Alabama businesses will be attracted to insure themselves adequately against insurable types of calamities. The benefits and protection that such coverage affords redounds to the benefit of the general public and lessens the burden that calamities might otherwise impose on state and local governments and thus upon Alabama taxpayers.

10. To promote greater use of insurance of all types in rural and sparsely populated sections of Alabama — market segments which usually are ignored by large, foreign companies but which may well be attractive to small, domestic companies if concentrating on such "vacant niches" can be made economically feasible.

11. To promote a higher rate of economic development in the state of Alabama. The provision of the Alabama law that allows the premium taxes of foreign insurance companies to be reduced .1% for each 1% of their admitted assets invested in Alabama is intended as an incentive for foreign companies to increase their Alabama investments above what they might otherwise elect to invest in Alabama. The objective of using premium tax incentives to attract added amounts to investment capital to Alabama is a particularly useful and potentially important economic benefit, given Alabama's long-standing position as a low-income, relatively underdeveloped state.

12. To promote the growth and development of a domestic insurance industry, thereby realizing the general economic and public benefit that derives from the fact that domestic insurance companies typically invest a far higher percentage of their admitted assets in Alabama than do foreign companies. Alabama's efforts to achieve economic parity with other, more economically-advanced states is materially enhanced by differential premium taxation because of the general practice of domestic insurance companies to direct significantly higher percentages of their investment capital to in-state projects. Domestic insurance companies are therefore a very important source of capital for financing projects that benefit the citizens of Alabama and that contribute to a faster rate of economic growth within the state.

13. To lessen the adverse impact which foreign insurance companies have on the economy of Alabama. Foreign insurance companies collect far more insurance premiums from Alabama policyholders than they reinvest in Alabama. By channeling the premiums collected in Alabama to investments and purposes outside of Alabama, the activities of foreign insurance companies have an adverse impact on economic growth within the State—much needed funds are being withdrawn from the State's economy at the very time when such funds are desperately needed to help boost economic activity within the State. In contrast, it is well known that domestic insurance companies, on average, reinvest a far higher proportion of their admitted assets in Alabama than do foreign companies. One of the purposes of differential premium taxation in Alabama is thus to help redress the adverse impact which foreign companies have on the State's economy as concerns the use of the premium income they obtain in Alabama and their relative disinclination to invest in Alabama's underdeveloped economy.



Achieving a higher degree of economic parity with the rest of the states in the United States has for many years been one of the State's foremost goals.

14. To raise revenues for the State of Alabama.

Defendant informs the Court that he anticipates that he will present testimony by recognized experts which will fully support each of these legitimate State purposes. Defendant further informs the Court that this testimony should be ready for presentation to the Court in approximately eight (8) weeks. Defendant respectfully requests the opportunity to present and preserve this testimony for the record.

Respectfully submitted,

/s/ Phillip Edward Stano
Phillip Edward Stano

/s/ Warren B. Lightfoot
Warren B. Lightfoot

/s/ Mabry Rogers
Mabry Rogers

# MOTION

Office - Supreme Court, U.S.
FILED
MAR 26 1984
ALEXANDER L. STEVAS,
CLERK

(5)

No. 83-1274

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1983

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

*Appellants,*

v.

W. G. WARD, JR., et al.,

*Appellees.*

On Appeal from the Supreme Court of Alabama

## MOTION TO DISMISS OR AFFIRM

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March 23, 1984

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No. 83-1274

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1983

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
*Appellants,*

v.

W. G. WARD, JR., et al.,
*Appellees.*

On Appeal from the Supreme Court of Alabama

## MOTION TO DISMISS OR AFFIRM

The Appellee William G. Ward, Jr., Commissioner of Insurance of the Department of Insurance of the State of Alabama (hereinafter the "State" or the "State of Alabama"), respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Alabama on the ground that it is manifest that the question raised by this appeal is so insubstantial as not to need further argument. The State also alternatively requests the Court to dismiss this appeal for failure properly to invoke the jurisdiction of this Court.

## STATEMENT OF QUESTIONS PRESENTED

1. Do the following present substantial federal questions requiring review by this Court:

A. Whether the encouragement of the formation of a useful and beneficial industry within a state, such as a domestic insurance industry, constitutes a legitimate state purpose.

B. Whether the encouragement of capital investment within a state constitutes a legitimate state purpose.

2. Whether this appeal should be dismissed because the appellees failed to exhaust their available state court remedies and instead consented to an adverse judgment being entered against themselves.

## I. INTRODUCTION

There are few if any issues which Appellants have preserved and are thus properly presented by this appeal. At most, the issues remaining are whether it constitutes a legitimate state purpose: (1) to encourage the formation of a useful and beneficial industry within a state; and (2) to encourage capital investment within a state. If *either* of these questions is due to be answered in the affirmative, the Appellee is entitled to prevail. Appellee will show, moreover, that both questions are so overwhelmingly due to be answered in the affirmative that this appeal does not present any substantial federal questions. Accordingly, this appeal should be dismissed, since further argument is unnecessary. Alternatively, the judgment of the Alabama Supreme Court is so manifestly correct that it should be affirmed without further argument.

There is, moreover, another reason why this appeal should be dismissed. The Appellants herein failed to exhaust their state court remedies, but instead consented to the entry of an adverse judgment against themselves in an apparent effort to create a "final judgment" so that this Court might render an advisory opinion with respect to the issues described in the preceding paragraph. Under such



circumstances, the jurisdiction of this Court has not been properly invoked, and this appeal should therefore be dismissed.

## II. HISTORY OF THE CASE BELOW

This case was brought in the Circuit Court of Montgomery County, Alabama (the "trial court") by thirty-nine (39) insurance companies, not qualifying as domestic insurers under Alabama law,[1] as an equal protection challenge to Alabama's premium tax statute, *Ala. Code* 1975, §§ 27-4-4 *et seq.* (Hereinafter the thirty-nine appellants will be referred to as the "foreign insurers".) The Alabama premium tax statute imposes a differential tax rate on "foreign" insurers, as that term is defined by the statute, as opposed to the rate imposed upon domestic insurers which maintain their principal offices and chief places of business within the state. The statute also permits foreign, but not domestic, insurance companies to reduce their tax liability through capital investment in certain Alabama assets and governmental securities.

Before the trial court (and throughout this litigation), all parties agreed that the foreign insurers' equal protection challenge must be resolved by the two-step analysis prescribed by this Court in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981) (hereinafter "*Western & Southern*"). *Western & Southern* involved an equal protection challenge to California's retaliatory tax statute, which discriminated against certain out-of-state insurance companies. In sustaining the validity of the California statute, this Court prescribed a

[1] In order to qualify as a "domestic insurer" under Alabama law, not only must an insurance company be incorporated in Alabama, but it must also maintain its "principal office and chief place of business" within the state. *Ala. Code* 1975, § 27-4-5. That statute appears in the appendix to appellants' Jurisdictional Statement at pp. 54a-57a.

two-tiered inquiry for resolving equal protection challenges: (1) whether the state purpose in enacting the statute was legitimate; and (2) if so, whether it was reasonable for the legislature to believe that the statute would promote the purpose. 451 U.S. at 668.

Acknowledging that this two-step inquiry constituted the proper analysis, the parties filed cross-motions for summary judgment before the trial court. On May 17, 1982, the trial court granted summary judgment in favor of the State, holding that in addition to raising revenue (which, by definition, all tax statutes do), the Alabama premium tax statute had at least two legitimate purposes: (1) encouraging the formation of new insurance companies in Alabama; and (2) encouraging capital investment by foreign insurance companies in certain governmental securities and Alabama assets. The trial court also found for the State on the second *Western & Southern* inquiry, holding that the Alabama legislature could have reasonably believed that the statute's classification would promote the legitimate state purposes.

Following an unsuccessful motion for a new trial, the foreign insurers appealed the judgment to the Alabama Court of Civil Appeals. On April 27, 1983, that court affirmed the trial court's ruling with respect to the legitimacy of the state purposes behind the statute, but went on to hold that the rational relationship issue had been prematurely decided through summary judgment. Therefore, the court remanded the case for a trial on the factual issues presented.

Both sides then petitioned the Alabama Supreme Court for a writ of certiorari. The foreign insurers sought review of the first *Western & Southern* inquiry, whether the state purposes were legitimate, and the State sought review of the appellate court's remand order. On September 23, 1983, all petitions for certiorari were denied, thus leaving intact the Court of Civil Appeals' ruling.



At this point, the foreign insurers deliberately elected to waive their rights to a trial on the factual issues of the case, and, through a joint motion with the State, consented to the entry of judgment against themselves and in favor of the State. (A copy of that joint motion appears in the appendix hereto.) On November 10, 1983, the Alabama Supreme Court, pursuant to the joint motion, entered a judgment against the foreign insurers denying their challenge to the Alabama premium tax statute. It is important here to note that the foreign insurers, rather than exhaust their available state court challenges to the statute, consented to the entry of an adverse judgment against themselves. It is this judgment from which they now seek to appeal.

Thus, the foreign insurers have waived all questions except that presented by the first *Western & Southern* inquiry, to-wit: whether the purposes of the Alabama premium tax statute are legitimate. Even assuming, then, that the jurisdiction of this Court has been properly invoked (a point the State does not concede [*see*, Point IV, *infra*]), the only question even arguably remaining for resolution by this Court is whether any of the purposes behind the Alabama premium tax statute constitute legitimate state goals.

## III. THE STATUTORY PURPOSES ARE LEGITIMATE

A. *Western & Southern.* In their jurisdictional statement before this Court, the foreign insurers seek to imply, incorrectly, that state tax measures which discriminate against out-of-state corporations are *per se* illegal under the Equal Protection Clause of the Fourteenth Amendment. (Jurisdictional Statement at 6, n. 6, and accompanying text.) The foreign insurers' position is in error. For exam-

ple, in *Western & Southern, supra*, this Court reviewed a California tax statute which discriminated against out-of-state insurance companies whose home states taxed California insurance companies at a rate higher than that at which California would have otherwise taxed such out-of-state insurance companies. Quite clearly, the California tax statute discriminated only against out-of-state insurance companies.[2] Nevertheless, despite the fact that the statute discriminated against out-of-state corporations solely on the basis of their domicile,[3] this Court sustained the statute due to the fact that it was rationally related to legitimate state purposes.

*Western & Southern's* equal protection analysis makes clear that taxing statutes are not invalid *per se* simply because they differentiate between domestic and out-of-state interests. In that case, this Court expressly permitted an insurance premium tax statute to vary its rate depending on the insurers' domiciles, because the statute's purposes were legitimate state interests.[4]

The Alabama premium tax statute has been determined by the Alabama courts to have at least two legitimate goals: (1) encouraging the formation of new insurance companies in Alabama (promoting a domestic industry); and (2) encouraging capital investment within Alabama. As the State will show, *infra*, these are unquestionably legitimate purposes.

---

[2]It also discriminated between out-of-state insurance companies whose home states applied tax rates different from one another.

[3]It must be remembered here that domicile alone is not sufficient for an Alabama insurance company to qualify as a "domestic company." In order to qualify, the company must also maintain its principal place of business within Alabama, thereby assuring jobs for many Alabama citizens. *See*, note 1, *supra*.

[4]The Court also required that the challenged classification be rationally related to the promotion of those goals. In the case at bar, however, the foreign insurers have already conceded that this point, the second *Western & Southern* inquiry, must be resolved in favor of the State.



B. *Promotion of Domestic Industry.* As noted, the Alabama Supreme Court affirmed the trial court and lower appellate court in their finding at least two legitimate purposes behind the Alabama premium tax statute. The first of those purposes, encouraging the formation of new domestic insurance companies, has long been held valid.

In 1937, in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), this Court declared:

> The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficial enterprise.

301 U.S. at 512. In *Carmichael*, two foreign corporations challenged an Alabama statute which taxed certain employers but not others. Excluded from the tax were employers of fewer than 8 persons, employers of agricultural laborers (in 1937, almost exclusively *domestic* employers), employers of children and/or a spouse (again almost exclusively domestic employers), and others. Though the tax concededly discriminated against the out-of-state plaintiffs, its validity was nevertheless sustained:

> Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one (citations omitted), or to restrict the other.

301 U.S. at 512. *Carmichael* stands clearly for the proposition that if the legislature perceives that an enterprise (a domestic insurance industry) is beneficial, that enterprise may be exempted from tax or taxed at a lower rate without violating equal protection guarantees.

In *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), the Supreme Court reaffirmed the *Carmichael* rationale:

> [I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes

> is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment.

358 U.S. at 528. *Bowers* involved an Ohio statute which exempted from taxation "merchandise or agricultural products belonging to a *nonresident* . . . if held in a storage warehouse for storage only." 358 U.S. at 523 (emphasis added). Ohio residents, on the other hand, were subjected to the taxation, and one of them challenged the statute. On review, this Court affirmed the lower court rulings upholding the statute and, in so doing, stated:

> [I]t is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy. . . . Other similar purposes reasonably may be conceived. Therefore we cannot say that the discrimination . . . was not founded upon a reasonable distinction or difference in state policy, or that no state of facts can be conceived to sustain it.

358 U.S. at 528-29. If the words "incorporation of insurance companies" are substituted for the words "construction and leasing and operation of warehouses," the applicability here of the *Bowers* rationale becomes strikingly apparent, and Alabama's policy of encouraging the development of a domestic insurance industry is shown to be a valid and legitimate state purpose.

That *Bowers* involved discrimination against residents, as opposed to non-residents, does not detract from the rationale. Though Justices Brennan and Harlan, in their concurring opinion, argued that whether the tax discriminated against residents or non-residents ought to affect the outcome,[5] the Supreme Court, in *Western & Southern*, rejected that distinction:

[5]358 U.S. at 533.



> Their position has not been adopted by the Court, which has subsequently required no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation. (Citations omitted.)

451 U.S. at 667, n. 21.

Thus, *Bowers*, in conjunction with *Western & Southern*, indelibly demonstrates that a state taxing statute may discriminate against foreign and in favor of domestic interests, provided there is a rational basis for its doing so.[6] *Bowers* further establishes that the rational basis exists (and the test is satisfied) if, in enacting the statute, the legislature intended to encourage an industry it deemed beneficial, such as a domestic insurance industry. The foreign insurers cannot escape the direct teaching of *Bowers*: a statute which encourages the location within the state of a needed or useful industry through differential taxation is not arbitrary and does not violate the Equal Protection Clause.

Other Supreme Court cases also confirm that a state may legitimately promote the development of its domestic industry. In *Parker v. Brown*, 317 U.S. 341 (1943), a California statute which regulated the marketing of the California raisin crop was challenged as being violative of the Commerce Clause. The statute was ultimately upheld, and in the course of its opinion, this Court made clear that a state has a legitimate interest in enhancing the ability of its local industry to operate profitably:

> [T]he production and marketing of raisins present a problem local in character and urgently *demanding state action for the economic protection of those engaged in one of its important industries.*

[6]The rational basis test is precisely the same as the two-tiered inquiry of *Western & Southern*.

317 U.S. at 368 (emphasis added). The Supreme Court expressly recognized, under a demanding Commerce Clause analysis,[7] that the economic protection of a domestic industry is a legitimate state purpose.

*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), also demonstrates that a state has a very real and legitimate interest in the welfare of its domestic industry. In upholding — again under the narrow strictures of the Commerce Clause — the validity of an Arizona statute regulating the packaging of produce grown within the state, the Court noted:

> Its [the statute's] purpose and design are simply to protect and enhance the reputation of growers within the state. *These are surely legitimate state interests.*

397 U.S. at 143 (emphasis added). The Supreme Court expressly recognized that a state has a legitimate interest in the welfare and reputation of its domestic industries, and that point is highly relevant for it leads to the inescapable conclusion that Alabama does, indeed, have a legitimate state interest in its domestic insurance industry.

This Court's decision in *Western & Southern*, *supra*, demonstrated once more that a state's promotion of a local or domestic industry is a legitimate purpose. In its opinion, the Court stated:

> This Court has recognized the legitimacy of state efforts to maintain the profit level of a domestic industry, *Parker v. Brown*, 317 U.S. 341, 363-367, 87 L.Ed. 315, 63 S.Ct. 307 (1943), and of efforts to "protect and enhance the reputation" of a domestic industry so

[7]The Commerce Clause has no application to the case at bar, since the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), removed all Commerce Clause restrictions on the states' taxation and regulation of the insurance industry. *See, Western & Southern*, *supra*, 451 U.S. at 654-55. That fact, however, does not detract from the relevant teaching of *Parker v. Brown*, that the encouragement of a domestic industry constitutes a legitimate state interest.



> that it might compete more effectively in the interstate market *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143, 25 L.Ed. 2d 174, 90 S.Ct. 844 (1970). *California's effort on behalf of its domestic insurance industry is no less legitimate.*

451 U.S. at 671 (emphasis added). The Supreme Court held — in the context of a domestic *insurance* industry — that the promotion of a domestic industry, through differential taxation based solely on place of domicile, is, indeed, legitimate.[8] That is precisely the issue presented by this appeal, and the *Western & Southern* holding establishes the correctness of the decision below.

Besides the United States Supreme Court, various state courts have also agreed that a state may legitimately promote its local industry by favoring domestic over foreign corporations. In *Galesburg Const. Co. v. Board of Trustees*, 641 P.2d 745 (Wyo. 1982), the Wyoming Supreme Court sustained a statute which mandated that public contracts be let to the Wyoming resident making the lowest bid if such resident's bid was not more than 5% higher than the bid of the lowest non-resident bidder. Conceding that the statute favored domestic over foreign corporations, the Wyoming Court stated:

[8]The only arguable difference in the effect of Alabama's statutory scheme and that of California (which was expressly upheld in *Western & Southern*) is that Alabama's law would tend to favor younger, smaller, domestic insurers which are competing primarily within Alabama, whereas California's assured those California companies which had become large enough and stable enough to compete outside the state. This distinction, however, relates not to Equal Protection but to Interstate Commerce Clause concerns, and state regulation of the insurance industry is not subject to interstate commerce objections. *Western & Southern*, *supra*, 451 U.S. at 654-55.

Moreover, it cannot reasonably be argued that the California statute did not discriminate in favor of California insurance companies in their interstate business, too, since the statute had the conceded effect of taxing a number of out-of-state insurance companies at a rate higher than that at which California insurers were taxed.

> [T]his is definitely a legitimate state interest. . . . When contracts are awarded to Wyoming corporations, as opposed to out-of-state corporations, local industry is encouraged. This contributes to, strengthens, and stabilizes the state and local economy. . . . The money payable under the contract is more likely to remain within the state, and enhance the tax base of the state and local government. Therefore, we conclude that, as applied to Galesburg, the statute does not run afoul of the Fourteenth Amendment.

641 P.2d at 750. The Wyoming Supreme Court expressly recognized, as a matter of judicial notice, some of the legitimate purposes that a statute which discriminates in favor of the domestic industry may have, and sustained the statute's validity. Similarly, in *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1953), the Supreme Court of Arizona held not violative of the Equal Protection Clause a statute which, in the letting of public contracts, granted a 5% preference to contractors who had paid county and state taxes for the two years immediately preceding. Clearly that statute had the purpose and effect of favoring domestic over foreign industry, yet it was nevertheless sustained.

Likewise, in *State v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917), the Supreme Court of Mississippi affirmed the validity of a statute limiting the awarding of printing contracts to establishments in the state actually engaged in the printing business and paying taxes thereon in the state. In *Equitable Shipyards v. State*, 93 Wash. 2d 465, 611 P.2d 396 (1980), the Supreme Court of Washington sustained a statute which favored domestic shipbuilders in the awarding of ferry construction contracts. And in *United Bldg. & Constr. Trades Council v. Camden*, 88 N.J. 317, 443 A.2d 148 (1982), *appeal pending*, the Supreme Court of New Jersey was called upon to decide the validity of a law which called for a forty percent



resident hiring quota for city public works. Though the statute obviously and concededly discriminated against non-residents, the New Jersey Supreme Court sustained the statute in the face of an equal protection challenge:

> Government may well conclude that residence will supply a stake or incentive for better performance in office or employment and as well advance the economy of the locality which yields the tax revenues.

443 A.2d at 161, *quoting, Kennedy v. City of Newark*, 29 N.J. 178, 148 A.2d 473 (1959). The New Jersey Supreme Court then concluded:

> Therefore, discrimination against non-residents of Camden does not offend the Equal Protection Clause if it has a rational basis. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L.Ed. 2d 480 (1959).

443 A.2d at 161. The teaching of these cases is clear and unmistakable: state and federal courts have agreed that a state may promote its local industry through a statute which favors domestic over foreign corporations.

It is beyond argument and the foreign insurers in fact concede that Alabama's premium tax statute was enacted, *inter alia*, to foster and promote Alabama's domestic insurance industry. What the foreign insurers do argue, however, is that such a purpose is not legitimate.[9] While the foreign insurers unsupportedly allege that all equal protection cases invalidating differential taxes demonstrate that such purpose is illegitimate,[10] they cite but one case, *infra*,

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[9]The foreign insurers are estopped to argue anything more, having expressly waived their rights to anything beyond contesting the legitimacy of the statute's purposes. *See*, text at pp. 3-5, *supra*.

[10]*See* Jurisdictional Statement at 13, wherein the foreign insurers argue that *Southern Railway v. Greene*, 216 U.S. 400 (1910), *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926), *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), and *Reserve Life Insurance Co. v. Bowers*, 380 U.S.

as being on point. As we will show, however, that case cannot properly be construed as supporting the position for which it is cited.

In *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), the Supreme Court was asked to consider a challenge to an Ohio law imposing a personal property tax on foreign but not domestic insurance companies. The statute was upheld in the Ohio courts, but the Supreme Court summarily reversed and remanded the case. 380 U.S. at 258.[11] This summary disposition was without opinion, and this Court did not discuss the reasons for reversing and remanding the case. Nevertheless, the foreign insurers examine a small portion of the State of Ohio's brief wherein Ohio argued:

> It is certainly not unreasonable to conceive that the Ohio legislature intended, by its substitution of the franchise tax for the personal property tax with respect to domestic insurance companies . . . to encourage the location of insurance companies in Ohio. (Jurisdictional Statement at 13)

Seizing upon that small portion of Ohio's brief, which was not mentioned in Ohio's introduction or conclusion as a

258 (1965), would all have been decided differently were promotion of domestic industry a legitimate state purpose.

Significantly, however, *none* of those cases so holds. Indeed, to maintain that they would have been decided differently is to fly in the face of unambiguous Supreme Court holdings that the promotion of a domestic industry is, indeed, valid. *See*, text at pp. 7-11, *supra*, and cases cited therein.

Moreover, the foreign insurers argument suffers from other infirmities. The *Southern Railway* and *Hanover Fire* cases related to the question of "privilege taxes," not at issue here, and since both were decided prior to the enactment of the McCarran-Ferguson Act, Commerce Clause as well as Equal Protection Clause concerns were at stake. Finally, as demonstrated in the text, *infra* at pp. 14-15, neither *Wheeling Steel* nor *Reserve Life* can properly be read as standing for the proposition about which the foreign insurers invite the Court to speculate.

[11]There is no subsequent reported decision in the *Reserve Life* litigation.



significant argument, the foreign insurers mistakenly assert that *Reserve Life* constitutes a rejection of the use of a differential tax to encourage a domestic industry. (Jurisdictional Statement at 14) This conclusion is clearly wrong for several reasons.

First, the Supreme Court's summary reversal discloses no reasons for such reversal. It is sheer speculation to assume that this isolated argument played any role in this Court's decision. The reversal could have been on any number of grounds, and the foreign insurers misdescribe *Reserve Life* to this Court when they say that it clearly rejected the encouragement of the formation of new domestic insurance companies as a legitimate state purpose. The *Reserve Life* record is barren of any such rejection.

Secondly, the summary reversal *remanded* the case to be considered in light of *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), a case which had not been considered by any of the Ohio decisions in *Reserve Life*. The challenged statute in *Wheeling Steel* did not have as any of its purposes the fostering of domestic industry.[12] *Wheeling Steel* never addressed or considered whether such a purpose would be legitimate (a question which has consistently been answered in the affirmative by other Supreme Court cases),[13] and this Court's citation of *Wheeling Steel* implies that the Court's reversal was on bases entirely apart from considerations of fostering a local Ohio industry. Additionally, *Wheeling Steel* is an extremely questionable precedent in light of its discussion in *Western & Southern*, *supra*.

[12]In *Allied Stores of Ohio v. Bowers*, *supra*, this Court declared that the only purpose of the challenged statute in *Wheeling Steel* "was to proffer to other States a scheme of 'reciprocity' for taxing accounts receivable." 358 U.S. at 529-30.

[13]*See* text at pp. 7-11, *supra*, and cases cited therein.

Thirdly, *Reserve Life* summarily reversed and remanded the decision of the Ohio Court of Appeals. This Court has made clear that its summary disposition of a case, particularly when the case involves constitutional issues, will be given little weight as precedent:

> [S]ummary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. *Equally obviously they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law.*

*Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (emphasis added) (footnote omitted).

Finally, *Reserve Life* did not even involve facts similar to those in the case at bar. Though the Ohio brief, in one isolated paragraph, did allude to the possibility that the statute might encourage the formation of new insurance companies within Ohio, it was neither argued that such was the underlying purpose of the statute nor was the case tried (or, presumably, decided) on such a theory.[14] Therefore, *Reserve Life* cannot possibly be read as holding that promoting the formation of new insurance companies within a state is an illegitimate purpose.

In summary, this Court's decisions leave no room for doubt that a state may permissibly seek to foster or promote the development of a domestic industry through differential treatment of foreign and domestic interests. *Western & Southern* confirmed this principle in the very context of this case – a domestic insurance industry. Accordingly, the foreign insurers' argument that Alabama's premium tax statute is without any legitimate purpose has no merit.

[14]Indeed, Ohio's Brief, which appears in the appendix to the foreign insurers' Jurisdictional Statement, affirmatively indicates that Ohio litigated the case almost exclusively on the theory that the *ad valorem* tax imposed on foreign insurers should be construed as a substitute for the franchise tax paid by domestic insurers. The only other "substantial" argument advanced by Ohio was that corporations somehow did not qualify as persons within the meaning of the Fourteenth Amendment.



C. *Encouraging Capital Investment within Alabama*

In addition to encouraging the formation of new domestic insurance companies, the Alabama courts also determined that the Alabama premium tax statute had at least one additional legitimate purpose: encouraging capital investment in certain Alabama assets and governmental securities. This purpose is undoubtedly valid, for surely a state may legitimately promote the retention and attraction of investment capital.

In *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), a non-resident of Montana challenged a state regulation imposing onerous fees on out-of-state elk hunters and a much smaller fee on resident elk hunters. The Supreme Court noted the "obvious limit in the elk supply" and held:

> The legislative choice was an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State.

436 U.S. at 290. Thus, the discrimination against non-residents was upheld on at least two grounds: (1) the state had a legitimate right to seek to preserve its resources or assets; and (2) the statute dealt with an area in which the state had a substantial regulatory interest.

In the case at bar, Alabama is a capital-poor state. Therefore, by encouraging investment within the State by foreign corporations, the State seeks to prevent the drain of capital, one of any state's most precious resources. Also, the insurance industry is unquestionably an area of substantial regu-

latory interest to the State. The federal government recognized that fact when it enacted the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. Thus, *Baldwin* is on all fours with the instant case and clearly teaches that Alabama has a legitimate interest in preserving and enhancing its limited supply of capital.

Furthermore, it is logically inconceivable that a state may not use tax incentives to encourage investment both to retain and to attract needed capital. That the investment incentive of the Alabama tax scheme applies only to foreign insurers does not detract from the legitimacy of the purpose, for it is not only reasonable to assume that domestic corporations (whose principal place of business must also be within Alabama) will maintain at least 10% of their assets[15] within the State, but they are required by statute to do so,[16] and this Court has held:

> The State is not compelled to verify logical assumptions with statistical evidence.

*Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Clearly Alabama could logically assume that the collection of premiums by a domestic insurer would not result in a significant drain of capital from the State, while the collection of premiums by a foreign insurer would. That the investment incentive was only made available to foreign insurers does not undercut the obvious and legitimate purpose which is for the State to retain and attract capital.

The foreign insurers seek to attack the obvious legitimacy of encouraging investment in several ways. First, they allege that the purpose is invalid because a foreign insurer

[15]The figure of 10% is used because if a foreign insurer invests that proportion of its admitted assets within Alabama, it receives the full benefit of the investment credit feature of the premium tax statute.

[16]*See*, *Ala. Code* 1975, § 27-27-29, in the appendix hereto, which in subsection (b) requires, with certain narrow exceptions, domestic insurers to maintain their assets within Alabama.



cannot reduce its overall tax liability so that it pays at the same rate as a domestic insurer. (Jurisdictional Statement at 14) While the observation is true, the conclusion is in error. It must be remembered that, under Alabama's premium tax statute, an insurance company cannot qualify as "domestic" unless it maintains its principal place of business within Alabama. While Alabama's statute does encourage investment within the state, through its tax reduction incentives, it does not treat those investors as full domestics because they have either failed or refused to make the *additional investment* of maintaining their places of business within Alabama so as to create jobs and employment opportunities for Alabama citizens. In other words, the statute provides for a reduction in tax liability based on investment within Alabama, but unless the insurance company is willing to make the additional investment of maintaining its principal place of business within the state, it will not enjoy the absolute lowest tax rate available.[17] Thus, the "differential" treatment about which the foreign insurers complain is based upon a rational distinction, and that is all the law requires.

The foreign insurers also attack the legitimacy of the investment incentive by claiming that, "[a]s a practical matter, it may not be possible for a foreign company to achieve the required investment percentage." (Jurisdictional Statement at 14-15, footnote omitted) Such argument relates to the *efficacy* of the statute, which is not properly in issue. As this Court stated in *Western & Southern*,

> [W]hether *in fact* the provision will accomplish its objectives is not the question: the Equal Protection

[17]Even Alabama insurance companies cannot enjoy the lowest tax rate available unless, in addition to being incorporated within the state, they also maintain their principal places of business within Alabama. Alabama companies which maintain their principal places of business elsewhere are treated as "foreign" for purposes of premium taxation. *See*, note 1, *supra*.

> Clause is satisfied if we conclude that the California Legislature *rationally could have believed* that the retaliatory tax would promote its objective.

431 U.S. at 671-72 (emphasis in original). Not only is the issue raised by the foreign insurers an irrelevant one (since it relates to *effect* rather than to what the legislature could have *rationally believed*), but it also goes to the second *Western & Southern* inquiry, with respect to which the foreign insurers have previously waived all rights.

Finally, the foreign insurers attack the legitimacy of the investment incentive through reference to *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921). (Jurisdictional Statement at 15, n. 13) At issue in that case was the validity of a statute which permitted foreign corporations in the automobile business to reduce their state taxes to the level at which domestics were taxed if they kept or invested three-fourths of their total assets within the state. The statute was struck down, but material to the Court's analysis was the fact that *the state itself admitted that the "investment incentive" was futile and unworkable*:

> [P]laintiffs in error assert that the provisions, as applied to them, is "contrary to all common sense," and that *the supreme court conceded the improbability of compliance with it by the manufacturer of another state. The attorney general of the state seems to concur in the denunciation, and adds to it the declaration that the insistence of the act is of an "utterly futile project"....*

256 U.S. at 425 (emphasis added). The statute in *Flynt* was not struck down on grounds that the state purpose was illegitimate; rather, the law was held to be unconstitutional because the legislature could not have *reasonably believed* that it would promote the obviously legitimate state purpose. Clearly *Flynt* does not stand for the proposition that encouraging investment within the state is an illegitimate



purpose. Indeed, this Court had the perfect opportunity to declare that such a purpose was not legitimate, but instead disposed of the case on the basis of reasonableness. Reasonableness, the *second* part of the equal protection analysis, would not have been reached had the state purpose been illegitimate; therefore, the *Flynt* decision implicitly held that encouraging investment within the state is a legitimate purpose. Far from supporting the foreign insurers' contentions, the *Flynt* court confirmed that investment incentive programs are legitimate.

In summary, the goal of the investment incentive feature of the Alabama premium tax statute constitutes a legitimate state purpose. It is inconceivable to maintain, as the foreign insurers attempt to do, that a state may not permissibly structure its tax system so as to encourage the retention and attraction of investment capital. Accordingly, it must be concluded that the Alabama premium tax statute does have legitimate purposes.

## IV. JURISDICTION IMPROPERLY INVOKED

As discussed in Point II, *supra*, at pp. 3-5, the foreign insurers deliberately and knowingly chose not to exhaust their state court remedies in this litigation. Indeed, rather than proceed to trial on the factual issues in this matter, as had been directed by the orders of the Alabama appellate courts, the foreign insurers voluntarily chose to waive their rights and sought to appeal to this Court solely on the legal issue presented by the first *Western & Southern* inquiry: whether the statutory purposes are legitimate.

Had the foreign insurers not consented to having judgment entered against themselves, and had they proceeded to trial as directed by the Alabama appellate courts, any necessity for this appeal might have been obviated. Instead, however, the foreign insurers sought, improperly, to invoke

the jurisdiction of this Court in order to obtain an "advisory opinion" with respect to a certain limited issue.[16]

Perhaps the foreign insurers were seeking to secure a tactical advantage with respect to their premium tax litigation in other states. But for whatever reason, the foreign insurers' action in initiating and bringing about a judgment against themselves, by waiving viable and substantial state court rights, renders highly suspect the question of whether jurisdiction for this appeal has been properly invoked.

It should be improper for a party having viable and substantial state court remedies to forego such avenues of relief and then appeal the judgment it consents to have taken against it. Perhaps the foreign insurers harbor a distrust of the Alabama court system, or perhaps they have some other strategy in mind. Nevertheless, the State of Alabama submits that a party should not be permitted to "leapfrog" over its judicial system and thereby deprive its courts of a full and fair opportunity to reach all the merits of a lawsuit challenging the constitutionality of one of its important statutes. The foreign insurers, by means of this appeal, are seeking to do precisely that. The State of Alabama submits that in so doing, the foreign insurers have failed properly to invoke the appellate jurisdiction of this Court, and this appeal should be dismissed on that basis.

## V. REASONS FOR DISMISSAL OR AFFIRMANCE

As noted, *supra*, the foreign insurers have preserved for appeal, at most, only the issue of whether the purposes of

[16]In consenting to and requesting that judgment be entered against them, the foreign insurers purported to preserve the right to seek review by this Court of the limited issue of whether the statutory purposes were legitimate. Whether an appeal is properly taken, however, is a jurisdictional issue over which a party cannot waive or alter the necessary prerequisites.



the Alabama premium tax statute are legitimate. If any one of them is legitimate, of course, the *Western & Southern* inquiry is satisfied and the State of Alabama is entitled to prevail on this appeal.

The Alabama courts below determined that the statute had at least two legitimate purposes: (1) encouraging the formation of new insurance companies within Alabama; and (2) encouraging the retention and attraction of investment capital within Alabama. As the State has demonstrated herein, each of these purposes is unquestionably valid, and the legitimacy of either is legally sufficient to sustain the statute.

The State of Alabama submits that the obvious legitimacy of both purposes demonstrates the insubstantiality of the federal question presented by this appeal. While relatively large sums of money may be involved, the fact remains that the only question even ostensibly preserved for review is whether *either* encouraging a domestic industry *or* encouraging capital investment is a legitimate state purpose.

In *Western & Southern*, this Court directly addressed the former question and held that such purpose was, indeed, legitimate. Accordingly, that issue cannot reasonably be disputed. Equally obvious, every state has a very real and legitimate interest in preserving and attracting investment capital. The foreign insurers have not, and they apparently cannot, cite any authority for the proposition that either of these purposes is invalid. In order to prevail, they must prove both to be illegitimate. This they have not done and cannot do. Simply put, the question presented for review is not substantial.

Accordingly this appeal should be dismissed for failure to present a substantial federal question. Alternatively, the judgment of the Alabama Supreme Court, in sustaining the

legitimacy of the state purposes, is so obviously correct that it should be affirmed.

Finally, there is an additional element to the case at bar warranting dismissal of this appeal. The foreign insurers, by waiving their rights to a trial on the second *Western & Southern* inquiry, failed to exhaust their state court remedies for contesting the Alabama premium tax statute. Had they done so, they might have prevailed, thereby negating the need for this appeal. Instead, by consenting to have a judgment taken against themselves, they sought to "leap-frog" over the Alabama judiciary and to create a final judgment by which they seek from this Court an "advisory opinion" as to the legitimacy of the purposes behind the Alabama premium tax statute. Presumably, they would then attempt to wield the decision as a controlling precedent in the other states in which they are conducting premium tax litigation. Whatever their reasoning, what they have sought to do is to appeal a judgment which they expressly requested be entered against themselves.

The State of Alabama suggests that this is an inappropriate means of seeking to invoke this Court's appellate jurisdiction. Accordingly, the failure to properly exhaust reasonable, available and substantial state court remedies provides an additional basis for dismissal of this appeal.



## VI. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the State of Alabama respectfully requests that this appeal be dismissed or, in the alternative, that the judgment appealed from be affirmed.

Respectfully submitted,

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March 23, 1984

# APPENDIX

IN THE SUPREME COURT OF ALABAMA

| | | |
|---|---|---|
| METROPOLITAN LIFE INSURANCE COMPANY, et al., APPELLANTS, | ) | |
| v. | ) | CASES NO. |
| HONORABLE WILLIAM G. WARD, JR., as Commissioner of Insurance of the Department of Insurance of the State of Alabama APPELLEE, | ) | SC 82-813 |
| | ) | SC 82-825 |
| | ) | SC 82-851 |
| AMERICAN EDUCATORS LIFE INSURANCE COMPANY, et al., APPELLEES/INTERVENORS | ) | |

## JOINT REQUEST FOR SUSPENSION OF THE RULES AND JOINT STIPULATION AND MOTION OF THE PARTIES FOR A REHEARING AND ENTRY OF JUDGMENT

Appellee, the Honorable William G. Ward, Jr. (successor as Commissioner to the Honorable Tharpe Forrester), Commissioner of Insurance of the Department of Insurance of the State of Alabama (hereinafter the "State"), and Appellants, Metropolitan Life Insurance Company, et al. (hereinafter the "Foreign Insurers") and Appellees/Intervenors, American Educators Life Insurance Company, et al. (the "Intervenors"), by and through this Joint Request, Stipulation and Motion, request that the Court, pursuant to Rule 2(b), of the Alabama Rules of Appellate Procedure, suspend the rules and especially Rule 39(j) and conduct a rehearing with respect to this Court's orders of September 23, 1983, in this cause, and the parties further hereby move the Court, upon rehearing, to enter a final judgment in favor of the State and the Intervenors,[1] which enables the parties to present the issues raised

[1]The Foreign Insurers, by entering into this Stipulation and Motion, do *not* concede that such judgment in favor of the State and the Inter-

in this case to the United States Supreme Court without the additional expense and delay of further proceedings below.

## I. INTRODUCTION

This case involves an equal protection challenge, under both the Alabama and United States Constitutions, brought by the Foreign Insurers seeking a declaration that the Alabama premium tax statute, *Ala. Code* § 27-4-4 *et seq.* (1975), is unconstitutional. The test for constitutionality, as conceded by all the parties, and as correctly understood by the Alabama Court of Civil Appeals, is the same under both state and federal law: (1) Does the statute have a legitimate state purpose; and (2) if so, was it reasonable for the Legislature to believe that the challenged classification would promote such purpose? The first question is one of law, and the second one is a mixed question of law and fact. The Circuit Court of Montgomery County determined that, with respect to the above-referenced test, there were no material issues of fact in dispute, and granted summary judgment in favor of the State and the Intervenors as a matter of law. On appeal, the Alabama Court of Civil Appeals held that the premium tax statute has at least two legitimate purposes, but also held that summary judgment was premature with respect to the second question. The case was therefore remanded for a trial or hearing on that issue.

Following applications for rehearing before the Court of Civil Appeals by all parties, which applications were all denied, the State and the Foreign Insurers (as well as the Intervenors) petitioned this court for a writ of certiorari, but all such writs were denied, thus leaving intact the lower appellate court's decisions remanding the case for a hearing on the second, factual prong of the test.

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venors is legally correct, and therefore reserve the right to seek review of such judgment.



## II. GROUNDS FOR REHEARING AND FOR AN ENTRY OF JUDGMENT

As noted, the case was remanded so that the trial court could conduct a factual inquiry concerning the second equal protection issue: whether the Legislature could have reasonably believed that the premium tax statute's use of the classification of insurance companies as foreign and domestic would promote any of the purposes which the lower courts have determined to be legitimate. In a brief supporting their petition for a writ of certiorari (Case No. SC 82-851), the Foreign Insurers, however, expresly waived any right to such a hearing on the factual issue. (*See*, p. 3 of Foreign Insurers Reply Brief, Attachment A hereto.)[8] [Page 10a of this Appendix.] Now, through this Joint Stipulation and Motion, the Foreign Insurers confirm and acknowledge that any right to an evidentiary hearing on the second issue has been, and hereby is, forever waived. This waiver leaves the order of the Court of Civil Appeals without substantive meaning, since subsequent to such order the right to an evidentiary hearing on the remanded issue was relinquished in a brief filed in this Court.

The State, the Foreign Insurers and the Intervenors are all confident that the Court would not require a case to be remanded for a trial where the right to trial on the factual issue has been expresly and voluntarily waived.[9] Accordingly, the parties hereby respectfully request the Court to grant a rehearing on the Court's orders denying the writs of certiorari in this case which have the effect of remanding the case to trial on the second issue. The State, the Foreign Insurers and the Intervenors further request that, upon rehearing, the Court render

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[8]The Foreign Insurers, who refer to themselves as "Taxpayers," stated in their Reply Brief: ". . . Taxpayers, for purposes of this litigation only, are prepared to, and do, waive their right to a trial on the second, factual issue."

[9]Indeed, the interests of judicial economy and efficiency militate strongly against remand when there can be no trial. Rather, such interests will best be served by the entry of a final judgment in favor of the State and the Intervenors, as requested herein through this Joint Stipulation and Motion.

a final judgment in favor of the State and the Intervenors, the reason therefor being: (1) There has been a final determination, both by the trial court and by the Court of Civil Appeals, that the Alabama premium tax statute has at least two legitimate purposes; and (2) any right to contest the second, factual issue as a factual question has been knowingly and voluntarily relinquished, thereby establishing that remand for trial on such issue would no longer be appropriate.*

In closing, the State, the Foreign Insurers and the Intervenors all jointly submit that the interests of efficiency and economy weigh heavily in favor of entering judgment in favor of the State and the Intervenors now rather than later, thereby expediting final resolution of this constitutional challenge to the Alabama premium tax statute.

## III. JOINT STIPULATION AND MOTION

NOW, THEREFORE, the parties hereto do jointly and voluntarily stipulate that there has been a full, complete and knowing waiver, by, for and on behalf of the Foreign Insurers, of any right to an evidentiary hearing or trial on the second, factual issue, to-wit: Whether the Legislature could have reasonably believed that the premium tax statute's use of the classification of insurance companies as foreign and domestic would promote any of the purposes which the lower courts have determined to be legitimate.

In view of this stipulation and agreement, the parties hereby submit that this Court's orders of September 23, 1985, should be reviewed and the parties do therefore respectfully move the Court to conduct a rehearing and, upon such rehearing, to enter a final judgment in favor of the State and the Intervenors,

*The Foreign Insurers, of course, do not waive their right to seek review of this case in the United States Supreme Court and do not concede either issue as a matter of law. The Foreign Insurers reserve the right to present legal authorities and arguments with respect to both prongs of the two-part test in any appropriate forum. The Foreign Insurers enter into this Stipulation and Motion only for the purpose of insuring that a final, reviewable judgment be entered so that time and expense can be saved for all parties.



denying the Foreign Insurers' equal protection challenge to the Alabama premium tax statute, *Ala. Code* § 27-4-4 *et seq.*, (1975), so that the case can go forward to its ultimate conclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, on this the 12th day of October, 1988, that a copy of the foregoing Joint Stipulation and Motion of the parties for a Rehearing and an Entry of Judgment has been served upon the following, first class postage prepaid, properly addressed, and sent by United States mail:

1. Honorable Charles Graddick, Attorney General, 250 Administrative Building, Montgomery, Alabama 36130;
2. Mark V. Meierhenry, Esquire, and Douglas E. Kludt, Esquire, Attorney General's Office, State Capitol, Pierre, South Dakota 57501-5090;
3. A. G. McClintock, Esquire, and John W. Renneisen, Esquire, Attorney General's Office, State of Wyoming, 123 State Capitol, Cheyenne, Wyoming 82002; and
4. Frank V. Kelley, Esquire, and Louis V. Caruso, Esquire, Attorney General's Office, State of Michigan, 740 Law



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OF COUNSEL.

IN THE SUPREME COURT OF ALABAMA

| | | |
|---|---|---|
| METROPOLITAN LIFE INSURANCE COMPANY, et al., APPELLANTS, | ) | |
| v. | ) | CASE NO. SC 82-851 |
| THARPE FORRESTER, as Commissioner of Insurance of the Department of the State of Alabama, et al. APPELLEE. | ) | |

## REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITIONER METROPOLITAN'S PETITION FOR WRIT OF CERTIORARI

In its Brief in Opposition to Taxpayer's Petition for Writ of Certiorari, the State takes the position that the issue decided in the State's favor by the Court of Civil Appeals is not "ripe" for review by this Court and, accordingly, that the Taxpayers' petition should be denied. As this Court will see from reading the Taxpayers' brief in support of its petition, the ultimate issue of the validity of Alabama's discriminatory gross premiums tax statute rests on the Court's disposition of two sub-issues:

(1) Does the statute have a legitimate purpose; and

(2) Was it reasonable for the Legislature to believe that the discriminatory classification employed would promote that purpose?

The statute must pass both tests. A finding for the Taxpayers on *either* would be fatal to the tax and the tax will fall. The first sub-issue, which is a legal issue, was thoroughly briefed, argued, and disposed of by both the trial court and the Court

**Attachment A to "Joint Request for Suspension of the Rules and Joint Stipulation and Motion of the Parties for a Rehearing and Entry of Judgment"**



of Civil Appeals. As to this issue, the statute has undergone a constitutional challenge and has been held valid by the trial court by its finding of at least three legitimate purposes and by the Court of Civil Appeals by its finding that at least two such purposes are legitimate.

Rule 39 does not mandate that all issues presented below be fully and finally disposed of. Indeed, the rule states:

> "Decisions of the courts of appeals may be reviewed by the Supreme Court on Petition for Writ of Certiorari only after the court of appeals has overruled an application for rehearing on the point, issue, or decision complained of."

The phrase "point, issue, or decision" is in the disjunctive, meaning, of course, that the court can review an "issue" if the Court of Civil Appeals has denied rehearing on the issue as it has in this case. Clearly, under any reading of the rule, the issue is ripe for decision at this time.

A decision to the contrary would create a procedural anomaly that surely this Court did not intend when it promulgated Rule 39. The State, as the Court knows, has also filed a Petition for Writ of Certiorari on the issue decided in favor of the Taxpayers (Case No. 82-813). Consider the implications if this Court were to deny Taxpayers' petition, but to grant the State's petition and, then, to reverse the holding of the Court of Civil Appeals and remand with instructions for that court to enter an order upholding the trial court on the second issue. If the court of Civil Appeals then issued an order affirming the trial court on both sub-issues, would the first issue be ripe for decision at that point? While logically, it perhaps should be, it is not clear under the rule that it would be. Rule 39 provides that a Petition for Writ of Certiorari must be filed within ten days after the Court of Appeals has denied rehearing on the "point, issue, or decision complained of," and Rule 40 provides that Application for Rehearing must be filed within fourteen days after the rendition of judgment. The judgment on the first issue was rendered on April 27, 1983, and rehearing was asked for within fourteen days. Subsequent

to the denial of a rehearing, this petition was filed. A judgment issued after this court disposed of the second issue will, of course, by necessity, be outside the allowable time. Accordingly, Taxpayers were forced by the rules to file their petition when they did.

As this Court can readily perceive, this case, while not "multi-state litigation" as alleged by the State, does have nationwide implications because it raises a federal constitutional issue which has been raised with respect to similar tax schemes in other states. A final decision by the United States Supreme Court in this case (or in a similar case from another state) on the issue raised here, would be binding on all state courts and be determinative of cases in other states. Accordingly, a timely decision on the issue of whether there is a legitimate purpose for Alabama's discriminatory tax scheme is of greater importance to the Taxpayers than the right to a trial on the second, factual issue. Thus, if this Court feels that the issue raised in Taxpayers' brief is not "ripe" under the present posture of the case, Taxpayers, for purposes of this litigation only, are prepared to, and do, waive their right to a trial on the second, factual issue. The effect of this waiver, on Taxpayers' behalf, is a concession on their part that, if put to a trial, there would be competent evidence produced by the State which would make the second, factual issue at least debatable as to, and only as to, the three purposes identified as legitimate by the courts below. Taxpayers have taken the position that the so-called investment incentive was not a purpose, actual or conceivable, for discriminatory tax scheme. (R. 699) If, however, this Court finds that the so-called investment incentive is a purpose, then the waiver made here would be applicable to that alleged purpose also.

DATED: July 20, 1985.

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## CERTIFICATE OF SERVICE

I, Richard F. Allen, Attorney for Appellants, hereby certify on this the 20th day of July, 1985, that I have duly served a copy of the foregoing Reply to State's Brief in Opposition to Petitioner Metropolitan's Petition for Writ of Certiorari on the following persons, properly addressed, first class postage pre-paid, and properly mailed in the U.S. mails.

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*Ala. Code* 1975, § 27-27-29

**§ 27-27-29. Principal place of business and home office of domestice insurers; maintenance of assets in state; removal of records or assets; exceptions.**

**(a) Every domestic insurer shall have, and maintain, its principal place of business and home office in this state and shall keep therein complete records of its assets, transactions and affairs in accordance with such methods and systems as are customary or suitable as to the kind, or kinds, of insurance transacted.**

**(b) Every domestic insurer shall have, and maintain, its assets in this state, except as to:**

**(1) Real property and personal property appurtenant thereto lawfully owned by the insurer and located outside this state; and**

**(2) Such property of the insurer as may be customary, necessary and convenient to enable and facilitate the operation of its branch offices and "regional home offices" located outside this state as referred to in subsection (d) of this section.**

**(c) Removal of all, or a material part of, the records or assets of a domestic insurer from this state except pursuant to a plan of merger or consolidation approved by the commissioner under this title, or for such reasonable purposes and periods of time as may be approved by the commissioner in writing in advance of such removal, or concealment of such records or assets, or material part thereof, from the commissioner is prohibited. Any person who removes, or attempts to remove, such records or assets, or such material part thereof, from the home office or other place of business or of safekeeping of the insurer in this state with the intent to remove the same from this state or who conceals or attempts to conceal the same from the commissioner, in violation of this section shall, upon conviction thereof, be guilty of a felony, punishable by a fine of not more than $10,000.00, or by imprisonment in the**

penitentiary for not more than five years or by both such fine and imprisonment in the discretion of the court. Upon any removal or attempted removal of such records or assets or upon retention of such records or assets, or material part thereof, outside this state beyond the period therefor specified in the commissioner's consent under which the records were so removed thereat or upon concealment of, or attempt to conceal, records or assets in violation of this section, the commissioner may institute delinquency proceedings against the insurer pursuant to the provisions of chapter 32 of this title.

(d) This section shall not be deemed to prohibit or prevent an insurer from:

(1) Establishing and maintaining branch offices or "regional home offices" in other states where necessary or convenient for the transaction of its business and keeping therein the detailed records and assets customary and necessary for the servicing of its insurance in force and affairs in the territory served by such an office, as long as such records and assets are made readily available at such office for examination by the commissioner at his request; or

(2) Having, depositing or transmitting funds and assets of the insurer in, or to, jurisdictions outside of this state required by the law of such jurisdiction or as reasonably and customarily required in the regular course of its business, including the retention of personal property or securities in a depository outside the state of Alabama for purposes of safekeeping or for the convenient operation of the insurer.

(e) For good cause shown and with the written permission of the commissioner, a domestic insurer may maintain its executive offices outside the state of Alabama, provided it keeps an office managed by one or more officers of the insurer and a complete duplicate set of records in Alabama and further agrees to make all records at the executive offices outside Alabama available to the commissioner of Alabama upon reasonable notice by him.



(f) This section shall not apply to those actions taken by insurance companies prior to January 1, 1972, but only applies to future actions of domestic insurance companies.

(g) Notwithstanding any other provision of this section, any company may evidence ownership of its assets by use of a clearing corporation or book-entry deposit system.

# REPLY

# BRIEF

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No. 83-1274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
*Appellants,*

v.

W.G. WARD, JR., *et al.*,
*Appellees.*

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**On Appeal from the Supreme Court of Alabama**

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## REPLY BRIEF OF APPELLANTS

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IN THE

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METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
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*Appellees.*

On Appeal from the Supreme Court of Alabama

## REPLY BRIEF OF APPELLANTS

### I

In their Motions to Dismiss or Affirm, appellees[1] do not dispute that the issue raised here is a recurring one of nationwide importance. Nor have they rebutted in any way appellants' showing that the decision below conflicts directly with the decisions of the courts of virtually every other state in which this issue has arisen.[2]

[1] Appellee W. G. Ward, Jr., Commissioner of Insurance of the State of Alabama, will be referred to herein as "the Commissioner." Appellees American Educators Life Insurance Company, *et al.*, will be referred to as "Intervenors." Pursuant to Rule 28.1, the appellant companies and their corporate parents, subsidiaries and affiliates are listed in the Supplemental Appendix filed with the Jurisdictional Statement.

[2] *See* cases cited at pages 17-18 of appellants' Jurisdictional Statement. Indeed, the conflict in the state courts is highlighted by

They nevertheless assert that the federal question presented in this case is insubstantial.[3] As will be demonstrated, this assertion reflects a fundamental misunderstanding of the issue raised when a state attempts to impose a higher tax on out-of-state companies than on its own companies.

Appellees have attempted to recast the issue as though the sole question were whether the states' asserted purposes—promoting the Alabama domestic insurance industry and encouraging capital investment in Alabama—were, in the abstract, permissible purposes for a state to pursue. *See, e.g.*, Motion of Commissioner at 1-2 (Statement of Questions Presented). That is emphatically not the issue. The question is whether those purposes—or others like them which the State's lawyers may conceive—justify the imposition of more onerous taxes on nonresident companies, as a class, than on local companies. On that issue, the decisions of this Court over a span of almost 75 years are clear and consistent: domestic preference taxes violate the Equal Protection Clause of the Fourteenth Amendment.[4] Appellees' claims to the contrary are based on a series of interpretational errors and misstatements that are pointed out in the discussion which follows.

Intervenors contend that the prior decisions of this Court holding domestic preference taxes invalid were

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appellees' heavy reliance on state court decisions that they assert support the decision below. *E.g.*, Motion of Commissioner at 11-13.

[3] Motion of Commissioner at 5-21; Motion of Intervenors at 4-9. In addition, the Commissioner's Motion suggests that the jurisdiction of this Court has not been properly invoked. Motion of Commissioner at 21-22. This contention is addressed in Part II of this Reply Brief.

[4] *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968); *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494 (1926); *Southern Railway v. Greene*, 216 U.S. 400 (1910).



"overruled by implication" in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981). Motion of Intervenors at 7 & n.4. This contention is astonishing in light of the fact that the very decisions the Court supposedly overruled were cited and quoted with approval in the majority opinion in *Western & Southern*. *Id.* at 662-67. Moreover, the dissenting Justices in *Western & Southern* stated without qualification that "mere difference in residence is admittedly an insufficient reason for disparate [tax] treatment," citing as authority both the majority opinion in *Western & Southern* and one of the decisions Intervenors now assert was overruled *sub silentio* in that majority opinion. *Id.* at 676 & n.4 (Stevens, J., dissenting) (citing *id.* at 667-68; *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572 (1949)).

The Commissioner makes the slightly more rarefied argument that, by upholding the validity of California's retaliatory tax under the Equal Protection Clause, the *Western & Southern* decision necessarily indicated that domestic preference taxes are valid as well. Motion of Commissioner at 11 & n.8. This argument, however, ignores the crucial differences between a retaliatory tax and a domestic preference tax. First, as this Court recognized in *Western & Southern*, the purpose of retaliatory tax laws is "to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes." 451 U.S. at 668. The purpose of domestic preference taxes, by contrast, is just the opposite—to promote domestic industry by *erecting* barriers to interstate business. Second, as the Court was careful to point out in *Western & Southern*, "It is clear that the purpose [of retaliation] is not to generate revenue at the expense of out-of-state insurers." *Id.* at 669. Obviously, the same cannot be said of domestic preference taxes. The view that *Western & Southern* validated domestic preference taxes thus ignores the very premises on which *Western & Southern* was decided.

Equally implausible is the view advanced by the Commissioner that, because the purpose of promoting domestic industries has been held permissible in certain other contexts, it must necessarily be a valid justification for domestic preference taxation. *See* Motion of Commissioner at 7-13. The fallacy in this reasoning is pointed up by this Court's analysis in *Western & Southern*. " 'No doubt,' " the Court observed " 'there are . . . subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.' " 451 U.S. at 668 (quoting *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 493-94 (1927)). Under the Commissioner's view, this careful distinction would be unnecessary, since the purpose of promoting domestic companies would *always* support treating foreign companies less favorably. This Court has never so held, however. Indeed, while the Court has sustained regulatory and police power measures that encourage local business activity, *see, e.g., Parker v. Brown*, 317 U.S. 341 (1943), as well as tax provisions that reward *non-residents* for entering the state to do business, *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), it has never once upheld a domestic preference tax where the Equal Protection Clause was found to be applicable.

Appellees turn for support to state court decisions which they assert have upheld the granting of a preference to local residents in government hiring and contracting. *See* Motion of Commissioner at 11-13; Motion of Intervenors at 10-11 n.6. These cases plainly do not support the imposition of domestic preference taxes, however, inasmuch as they involve the exercise by the states of their proprietary function and not their taxing power. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 & n.20 (1976).[5] Similarly, the Commissioner can draw no comfort from *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978), *see* Motion of Commissioner at 17, which merely upheld the state's right to conserve a natural resource committed to its trusteeship by imposing differential license fees on in-state and out-of-state recreational hunters.



Appellees' confusion about the basic issue here is evident in the Commissioner's heavyhanded attempts to distinguish the prior decisions of this Court holding domestic preference taxes invalid. For example, the Commissioner errs in at least three significant respects in seeking to distinguish this Court's decision in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), which held an Ohio personal property tax on foreign insurers—but not domestics—to be a violation of equal protection. First, by invoking *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), *see* Motion of Commissioner at 16, the Commissioner attempts to treat *Reserve Life* as though it were a mere summary affirmance, entitled to little precedential value. In fact, however, *Reserve Life* was not a summary affirmance, but a *plenary reversal*. Far from being a "summary disposition . . . without opinion," Motion of Commissioner at 14, the *Reserve Life* case was fully briefed on the merits, argued to the Court, and decided in a *per curiam* opinion. 380 U.S. 258 (1965). It is thus entitled to as much dignity as any other fully-considered decision of this Court.

Second, contrary to the Commissioner's contention, appellants have not, in construing *Reserve Life*, "[s]eiz[ed]

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[5] Moreover, at least two of the cases upon which the Commissioner relies, *United Building & Construction Trades Council v. Camden*, 88 N.J. 317, 443 A.2d 148 (1982), and *Sekrey v. Alliance Steel Manufacturing Co.*, 75 Ariz. 282, 255 P.2d 604 (1953), did not involve statutes that discriminated between in-state and out-of-state residents *per se*. In addition, neither of the appellees noted that the *Camden* case was reversed by this Court more than a month before appellees filed their Motions. 104 S. Ct. 1020 (Feb. 21, 1984).

upon [a] small portion of Ohio's brief, which was not mentioned in Ohio's introduction or conclusion as a significant argument." Motion of Commissioner at 14-15. To the contrary, the brief of the State of Ohio in *Reserve Life* argued, in the Summary of Argument, that the personal property tax was "in favor of domestic companies but entirely within the bounds of preference permitted by the Fourteenth Amendment for the purpose of serving the public interest. The basis upon which it is conceived is clearly rational." *See* J.S. App. at 53a. Ohio's brief went on to discuss at length the very precedents now relied upon by the Commissioner to support his position. *Compare id.* at 56a-57a *with* Motion of Commissioner at 7-8 (both citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937), and *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528 (1951)). It is thus manifest that, in holding the Ohio statute invalid, the Court must have addressed, and rejected, the argument that the statute was justified by the State's purpose "to encourage the location of insurance companies in Ohio." J.S. App. at 59a. The Commissioner is patently in error in suggesting that the "reversal could have been on any number of grounds." Motion of Commissioner at 15. In order to reverse the decision below, the Court necessarily had to reject each and every ground asserted by Ohio on which the decision might have been sustained. *See Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979); *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

Finally, the Commissioner's claim that the *Reserve Life* Court "remanded the case to be considered in light of *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)," Motion of Commissioner at 15 (emphasis in original), is simply wrong. The Court's *per curiam* opinion expressly reversed the decision below, *see* 360 U.S. at 358, nowhere suggesting that the accompanying remand left the federal constitutional issue unresolved. Where the Court



vacates a judgment and remands the case for further consideration in light of another opinion, its practice is to say so explicitly. *See, e.g., Sandin v. Texas*, 389 U.S. 239 (1965), decided the same day as *Reserve Life*. The citation to *Wheeling Steel* in *Reserve Life* thus can only have been intended to indicate that the Court regarded that precedent as controlling on this issue. *See also WHYY, Inc. v. Glassboro*, 393 U.S. 117, 119 (1968).

The Commissioner's attempt to distinguish *Southern Railway v. Greene*, 216 U.S. 400 (1910), and *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494 (1926), is equally unavailing. Indeed, the argument that "since both [cases] were decided prior to the enactment of the McCarran-Ferguson Act, Commerce Clause as well as Equal Protection Clause concerns were at stake," Motion of Commissioner at 13-14 n.10, is doubly incorrect. First, in both cases the Court's holding was premised only on the Equal Protection Clause, with no mention of the Commerce Clause. *See* 216 U.S. at 418; 272 U.S. at 516. Second, and perhaps more notably, Commerce Clause concerns were *completely* irrelevant in *Hanover Fire*, since the plaintiff in that case was an insurance company, and in 1926 the business of insurance was not considered to be commerce and hence was not subject to the Commerce Clause. *Compare United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), *with New York Life Insurance Co. v. Deer Lodge County*, 231 U.S. 495 (1913).

Not only has the Commissioner failed to distinguish the relevant decisions of this Court, but he has totally ignored the most recent case holding a domestic preference tax unconstitutional—*WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968), a decision which drew upon *Reserve Life, Wheeling Steel, Hanover Fire* and *Southern Railway*, *see id.* at 119-20, at a time when, if the Commissioner's reasoning is correct, this Court's decision in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), had

already undercut the rationale of those decisions. *See* Motion of Commissioner at 8-9. Appellees' desperate efforts to distinguish—or to wish away—this Court's past decisions reflect their misunderstanding of the basic issue raised here. Appellants are not challenging the general principle that states have a legitimate interest in the health of the local economy. They are challenging domestic preference taxation. This form of taxation—and the justifications proffered for it here—have uniformly been rejected by this Court. Plainly, therefore, the issue raised is substantial.

## II

In a final effort to stave off review by this Court, the Commissioner's Motion asserts that appellants have not properly invoked the Court's jurisdiction because of an alleged failure to exhaust available state remedies. Motion of Commissioner at 21-22. With good reason, the Commissioner has not cited even a single authority for this assertion, which is plainly without substance.

Appellants waived their right to submit evidence regarding the second prong of the *Western and Southern* test because they recognized that, given the course which the litigation had taken, the introduction of evidence on this issue would not be a useful exercise. Once the factual issues were removed from the case by appellants' voluntary waiver of their right to a hearing, it was evident that the only issue remaining was whether, as a matter of law, the justifications put forward by the state were sufficient to sustain the domestic preference tax. Appellants exhausted their available state remedies by putting that issue before the Alabama Supreme Court, which declined to review it. In such circumstances, this Court has consistently recognized that it is unnecessary for a litigant to pursue a state remedy which, by virtue of the litigant's own concession, would be a meaningless ritual. *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966); *Construction & General Laborers' Union v. Curry*, 371



U.S. 542, 551 (1963); *Pope v. Atlantic Coast Line Railroad*, 345 U.S. 379, 382-83 (1953).

The Commissioner's jurisdictional objection might have some merit if appellants were now seeking to reopen the issue on which they waived the right to a hearing, namely, the factual question whether the legislature could have believed that the challenged statutory classification would advance its alleged purposes. Appellants do not rely on any such factual argument, however. Under these circumstances, appellants cannot have been obligated to go through a futile evidentiary proceeding simply to preserve their right to appeal. As this Court has explained, "Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966) (footnote omitted). Accordingly, there is no serious issue as to the Court's jurisdiction to entertain this appeal.

## CONCLUSION

For the reasons stated here and in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

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No. 83-1274

In The
# Supreme Court of the United States
October Term, 1983

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Metropolitan Life Insurance Company, et al.,
*Appellants*
v.
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*Appellees*

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On Appeal from the Supreme Court of Alabama

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## BRIEF OF AMICI CURIAE STATES OF CONNECTICUT, RHODE ISLAND, MASSACHUSETTS AND NEW HAMPSHIRE IN SUPPORT OF REVERSAL

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## BRIEF OF AMICI CURIAE STATES OF CONNECTICUT, RHODE ISLAND, MASSACHUSETTS AND NEW HAMPSHIRE

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This Brief in support of appellants is submitted in accordance with Rule 36.4 of the Rules of this Court.

## INTERESTS OF AMICI CURIAE

The *amici curiae* are all States of the Union with a strong interest in putting an end to discriminatory taxation of nonresident insurance companies.

1. There are 102 insurance companies domiciled in the State of Connecticut, including some of the largest in the nation. A significant number of these Connecticut companies do business in all 50 states, including Alabama.[1]

The State of Connecticut does not impose domestic preference taxes on insurance companies. Indeed, Con-

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[1] There are 88 Connecticut insurance companies licensed to do business in the state of Alabama.

necticut taxes nonresident insurance companies less than domestic companies[5] for at least two reasons: to avoid retaliation by other states, *see Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981), and to attract nonresident insurance companies to do business in the state to ensure the widest range of insurance products and services for Connecticut residents and businesses, *see Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959).

Yet Connecticut's policy of fair treatment of nonresident insurance companies is not reciprocated by more than half the states where Connecticut insurance companies are required to pay higher taxes. This is not because of any business distinction between Connecticut-chartered insurance companies and local insurance companies but *solely* because they are Connecticut companies. As asserted by the State of Alabama, these "domestic preference taxes" are designed to give local insurance companies a competitive advantage over nonresident insurance companies. While Alabama asserts an investment purpose for its domestic preference statute, nonresident insurance companies can never, under the statute, be taxed equally with domestic companies.[6] The State of Connecticut avers that this discrimination is wholly arbitrary and asserts the right of its corporate citizens to equal treatment in other states where they have been admitted and qualified to do business.

Moreover, the effects of these domestic preference statutes are exported to other states and borne by consumers in Connecticut and elsewhere in the form of increased costs. Since life insurance rates are generally set nationally and do not vary from state to state, the costs of this discrimination are simply factored into the premiums

[5] *See* Conn. Gen. Stat. §§ 12-202, 12-210, and 12-214.

[6] *See* Ala. Code § 27-4-4 (1975).



paid by all life insurance consumers. W. Vance, *Insurance* 77 (3rd ed. 1951).

For these reasons, Connecticut urges the Court to hold Alabama's discriminatory tax on nonresident insurance companies invalid.

2. The Massachusetts statutory scheme concerning the taxation of insurance companies reflects a series of legitimate state interests, all of which are adversely affected by the existence of discriminatory tax systems in other states. Massachusetts does not merely assert the rights of its individual and corporate citizens. Instead it also asserts its own sovereign interests, reflected in its statutory system. The Commonwealth's tax laws for insurance companies are set forth in Mass. Gen. Laws Ann. c. 63, §§ 20-29B (West 1969). Unlike the Alabama law implicated by this appeal, but much like the Ohio statute at issue in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), the Massachusetts statutes not only do not discriminate against out-of-state insurers, they actually favor them over domestic companies in certain respects. Mass. Gen. Laws Ann. c. 63, §§ 22A, 22B (West 1969). There are also so-called "retaliatory" features to the Commonwealth's tax structure, Mass. Gen. Laws Ann. c. 63, §§ 21, 23, 24A (West 1969), which are similar to those considered by this Court in *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981).

While these various statutes are designed first as revenue-raising measures, they also promote both the interests of Massachusetts citizens as buyers of insurance policies and of Massachusetts insurance companies. By giving a slight advantage to foreign companies doing business within its borders, Massachusetts encourages competition and thereby seeks to gain for its citizens lower prices and a broad range of choice among insurance products. The retaliatory features of the law, on the other hand, promote "domestic industry by deterring barriers to interstate business." *Id.* at 671.

These goals are clearly frustrated by the existence of domestic preference tax laws such as Ala. Code § 27-4-4. The interests of individual citizens are thwarted through the imposition of higher premium costs caused when the effects of higher taxes are inevitably passed on. The Commonwealth's interest in promoting a domestic insurance industry is even more directly affronted by the Alabama statute. Retaliatory taxes are themselves anachronistic and inconsistent with the Commonwealth's overall policy of evenhandedness in taxation, but they are the only weapon, other than participation in proceedings such as this, the Commonwealth possesses in seeking to eradicate barriers to interstate insurance business.

3. In Rhode Island and New Hampshire, out-of-state insurers pay taxes on the same basis as in-state companies. This policy of evenhandedness, however, is not reciprocated in more than half the states where insurers from those states do business. Since the burden of domestic preference taxes in the discriminatory states is partially shifted onto insurance buyers in the remaining states, the citizens of Rhode Island and New Hampshire have a substantial interest in the validity of such taxes.

This Court, applying the Equal Protection Clause of the Fourteenth Amendment, has consistently held that state taxes discriminating against out-of-state corporations are unconstitutional. *E.g.*, *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117, 119 (1968), and cases cited. Until the decision below, the courts of the various states had uniformly reached the same result. See cases cited at p. 6 *infra*. The States of Rhode Island and New Hampshire, and their citizens, have a vital interest in upholding the principles of evenhandedness and comity embodied in the Equal Protection Clause. This interest in delivering barriers to interstate business is the same one that the Court upheld in *Western & Southern Life Insurance Co.* v. *State Board of Equalization of California*, 451 U.S. 648, 671 (1981). It is for this reason that these states, as *amici curiae*, urge this Court to hold Alabama's



discriminatory tax on foreign insurance companies invalid.

## SUMMARY OF ARGUMENT

Pursuant to Alabama's "domestic preference tax," nonresident insurance companies licensed to do business in Alabama are required to pay higher taxes than domestic companies. This is not because of any business distinction between in-state and out-of-state insurance companies but solely because the out-of-state companies are not from Alabama. The result is to competitively disadvantage nonresident companies.

Whatever power a state may have to impose conditions on the entry of foreign corporations to do business in the state, once it has permitted them to enter, they may not be discriminated against in the form of higher taxes solely on the basis of their foreign incorporation. *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117, 119-20 (1968).

Thus, Alabama's discriminatory tax on nonresident insurance companies fails to meet the rational basis test set forth in *Western & Southern Life Insurance Co.* v. *State Board of Equalization of California*, 451 U.S. 648, 668 (1981).

## ARGUMENT

The authority of the states to create classifications under the Equal Protection Clause for purposes of taxation is extremely broad. *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940); *Lenhausen* v. *Lake Shore Auto Parts Inc.*, 410 U.S. 356 (1973); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959). But, as this Court also observed in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. at 527,

> there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary.

It is respectfully asserted that unless the Equal Protection Clause, which provides the sole protection from

discrimination for nonresident insurance companies,[4] is wholly toothless, that point has been reached here.

In this regard the Court has held that whatever power a state may have to impose conditions on the entry of foreign corporations to do business in the state, once it has permitted them to enter they may not be discriminated against in the form of higher taxes solely on the basis of their foreign incorporation. *See WHYY, Inc. v. Glassboro*, 393 U.S. 117, 119-20 (1968); *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572 (1949); *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494, 511 (1926); *Southern Railway v. Greene*, 216 U.S. 400, 418 (1910).

This principle has also been applied by a number of state courts in finding violations of the Equal Protection Clause where taxes fall more heavily on out-of-state than in-state corporations, *e.g., Department of Revenue v. Amrep Corp.*, 358 So.2d 1343 (Fla. 1978); *Mary C. Wheeler School, Inc. v. Board of Assessors*, 368 Mass. 344, 331 N.E.2d 888 (1975); *Cleveland-Cliffs Iron Co. v. Department of Revenue*, 329 Mich. 225, 45 N.W.2d 46 (1950); *Missouri Pacific Railroad v. Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983); *Gilbert Associates v. Commonwealth*, 498 Pa. 514, 447 A.2d 944 (1982).

The only conclusion which can be reached from these cases is that the discrimination here is "palpably arbitrary."

---

[4] As this Court observed in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. at 655-56:

> Ordinarily, there are three provisions of the Constitution under which a taxpayer may challenge an allegedly discriminatory state tax: the Commerce Clause . . . the Privileges and Immunities Clause . . . and the Equal Protection Clause . . . . This case assumes an unusual posture, however, because the Commerce Clause is inapplicable to the business of insurance . . . and the Privileges and Immunities Clause is inapplicable to corporations. [Citations omitted.]



Alabama argues, however, that its discrimination has a rational basis. In discussing the rational basis test, the Court stated in *Western & Southern Life Insurance Co. v. State Board of Equalization*:

> As we held in *Power Manufacturing Co. v. Saunders*, 274 U.S. at 493-494:
>
> "No doubt there are . . . subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made."
>
> In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 461-463; *Vance v. Bradley*, 440 U.S. 93, 97-98 (1979).

451 U.S. at 668.

In this case, Alabama has asserted that two purposes could sustain its domestic preference tax: encouraging the formation of insurance companies in Alabama and promoting capital investment in Alabama by foreign companies. *See* J.S. App. at 9a.

This proves too much. The Constitution cannot accept the sweeping argument that discrimination is justified by a state's general interest in fostering its local economy. If this were the test, any discrimination against foreign corporations doing business in the state, no matter how egregious, could be justified under the Equal Protection Clause. *Compare, e.g., Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-72 (1949), *with Metropolitan Casualty*

*Insurance Co. v. Brownell*, 294 U.S. 580, 583-86 (1935). The right of equal protection is no right at all if it may be so easily withdrawn.

Further, while we appreciate Alabama's desire to encourage capital investment, that purpose will not sustain the discrimination against nonresident insurance companies doing business there because, short of moving to Alabama, they will always pay a higher tax than Alabama companies.[8] Thus, even with the investment feature of the Alabama statute considered, the statute's effect is to substantially disadvantage out-of-state companies by taxing them at a higher rate.

We also appreciate, and wholeheartedly agree, that promotion of local trade or industry is of great importance to the states. *See Parker v. Brown*, 317 U.S. 341 (1942); *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970); *Allied Stores of Ohio Inc. v. Bowers*, 358 U.S. 522 (1959). But this cannot be a "legitimate" state interest in all contexts, for all cases, and overriding all other considerations. In particular, it cannot justify the classification of foreign and domestic insurance companies present in the state for no other reason than to give the domestic companies a competitive advantage.[9]

---

[8] *See* Ala. Code § 27-4-4 (1975).

[9] The *amici* do not suggest that the Court fashion some new equal protection test for state tax laws which differentiate between foreign and domestic corporations. The standard of *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. at 668, is, we submit, the appropriate standard in this case. Nevertheless, as the Court there recognized, the classifications we as states impose "must rest on differences pertinent to the subject in respect of which the classification is made." *Id.*, quoting from *Power Manufacturing Co. v. Saunders*, 274 U.S. at 493-494. In this case it is not even debatable that the state's asserted interests are the cause of the distinction between in-state and out-of-state insurance companies. The Alabama statute rests instead on a parochial view of tax laws which would clearly violate the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, if they were applicable.



Alabama's motive for its domestic preference statute affects principles of federalism embodied in the Equal Protection Clause. *Allied Stores of Ohio Inc. v. Bowers*, 358 U.S. 522, 532-33 (1959) (Brennan, J., concurring); *Mary C. Wheeler School, Inc. v. Board of Assessors*, 368 Mass. 344, 331 N.E.2d 888 (1975). While a state may seek to enrich its own citizens at the expense of others, such a purpose is inimicable to our concept of federalism which, while more clearly stated in other parts of the Constitution, has clear implications in the Equal Protection Clause as well. Nor is Alabama aided in this regard by the Court's decision in *Western & Southern Life Insurance Co. v. State Board of Equalization*, *supra*. The legitimate state interest found there was the "promotion of domestic industry by deterring barriers to interstate business." *Id.* at 671.

We also seriously question whether, under the second prong of the rational basis test, it is reasonable to believe that this domestic preference tax will promote the purpose of enhancing the growth of a domestic insurance industry in Alabama. In view of the fact, not merely the threat, of retaliatory taxation, *see Western & Southern Life Insurance Co. v. State Board of Equalization*, *supra*, domestic Alabama insurance companies are disadvantaged in the national market, and it does not seem reasonable that any foreign insurer would willingly move to Alabama. The insurance business is national in scope and has been for many years. W. Vance, *Insurance* at 37. As such, domestic preference statutes for the purpose of aiding local companies can only be viewed as an anachronism whose continuing life actually harms the interests they were once apparently designed to support.

The National Association of Insurance Commissioners recognized as much in 1970 when it adopted a resolution calling for the elimination of premium tax discrimination between domestic and foreign insurers. "While such discrimination may have been justified when insurance

was an 'infant industry' in some parts of the country," the NAIC explained, "it is an anachronism today. It distorts competition by subsidizing some competitors, allocates tax burdens unfairly among policyholders, ignores the national nature of much of the contemporary insurance economy, and is likely to impel major insurers to make corporate or marketing changes which will enable them to escape the discrimination but which are not in the interest of a healthy insurance business functioning efficiently in the public interest." 1971 NAIC Proceedings, Vol. I at 70.

Finally, no matter what justifications are now advanced, Alabama's discriminatory tax is no more than a revenue raising measure, *see Houseal v. Union Bankers Insurance Co.*, 167 So.2d 708 (Ala. 1964),[1] that discriminates against nonresident insurance companies invidiously and solely because they are foreign corporations. As such, the Alabama domestic preference statute violates the Equal Protection Clause.

---

[1] *Cf. Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. at 669 (purpose of retaliatory tax not to generate revenue at expense of out-of-state insurer).



As noted above, the effects of Alabama's domestic preference statute have been passed on to life insurance consumers in Connecticut, Massachusetts, Rhode Island, New Hampshire and elsewhere in the form of increased costs. Accordingly, we would ask the Court to consider appropriate orders to ensure that any refunds due the appellant insurance companies likewise be passed on to consumers to prevent a windfall.

## CONCLUSION

For all of the foregoing reasons, *amici* urge the court to reverse the judgment below.

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# AMICUS CURIAE

# BRIEF

Office - Supreme Court, U.S.
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No. 83-1274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,

*Appellants,*

—v.—

W. G. WARD, JR., *et al.*,

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

## BRIEF *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS, SUBMITTED BY THE LIFE INSURANCE COUNCIL OF NEW YORK

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June 19, 1984

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---

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

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## BRIEF *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS, SUBMITTED BY THE LIFE INSURANCE COUNCIL OF NEW YORK

---

This brief in support of appellants is submitted in accordance with Rule 36.2 of the Rules of this Court with the written consent of the appellants and appellees on file with the Clerk of this Court.

## INTEREST OF *AMICUS CURIAE*

The Life Insurance Council of New York ("LICONY") is an association of life insurance companies formed under the Not-For-Profit Corporation Law of New York. The membership of LICONY includes 59 life insurance companies, which

are organized and doing business under the laws of the State of New York. Approximately 99% of the legal reserve life insurance in force in New York and sold by New York domestic companies is accounted for by members of LICONY. These companies also account for approximately 21% of life insurance premiums in the United States. Many of these companies are licensed to do business in New York and other states, and a great many of the latter do business in all 50 states.

New York and 17 of its sister states do not currently impose domestic preference taxes on life insurance companies. Consequently, out-of-state (foreign) life insurers licensed to do business in New York pay taxes on the same basis as domestic insurers.[1] This affords domestic and foreign insurers an equal footing from the standpoint of taxation in competing for a share of the insurance market in New York.

New York's policy of evenhandedness in the tax treatment of domestic and foreign insurers is not reciprocated in more than half the states in which companies from New York do business.[2] In these States, some 32 in all, domestic companies are

1 New York imposes on both domestic and foreign life insurance companies a premiums tax of 1% and, usually, an income tax of 9% on net income allocated to New York, subject to an overall 2.6% of taxable premiums limitation. N.Y. Tax Law §§ 1501 (McKinney 1975), 1502, 1505(a), 1510(b) (McKinney Cum. Supp. 1983).

2 States which discriminate on the basis of premiums tax rates include:

| | | |
|---|---|---|
| Alabama | Maine | Texas |
| Alaska | Mississippi | Washington |
| Arizona | Nebraska | Wyoming |
| Hawaii | North Carolina | |
| Kansas | Tennessee | |

States which discriminate on the basis of method of taxation (*e.g.*, premium tax for foreign insurers; income or other tax for domestic insurers) include:

| | | |
|---|---|---|
| Arkansas | Kentucky | Oregon |
| Florida | Michigan | South Carolina |
| Illinois | Ohio | |
| Indiana | Oklahoma | |

*(footnote continued)*



given preferential treatment in the area of taxation. Thus, New York insurers that do business in domestic preference tax states must, because they are not domiciled in those states, pay higher taxes than domestic insurers, thereby increasing their costs of doing business nationally. These additional costs are ultimately reflected in insurance premiums that consumers must pay both in domestic preference tax states and elsewhere. The anticompetitive nature of domestic preference taxes is particularly troublesome in the fiercely competitive group insurance markets. With the premiums tax burdens associated with group insurance being allocated directly to the state of residence of the persons insured, a difference between foreign and domestic company premiums tax rates as in Alabama can foreclose foreign insurers from local group insurance markets.

LICONY supports the principle of free and equal competition in the insurance market place and has, in the past, opposed discriminatory taxes which threaten that freedom. *See* Brief *Amicus Curiae* in Support of Appellant, Submitted on behalf of The Life Insurance Council of New York in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981). In that case, the Court sustained California's selectively discriminatory insurance retaliatory tax in the interest of deterring barriers to interstate business. *Id.* at 671. For that very reason, Alabama's premiums tax (Ala. Code §§ 27-4-4, 27-4-5 (1975)), which uniformly and invidiously discriminates at the state line in favor of domestic life insurance companies at the expense of foreign life insurance companies and therefore erects a barrier to interstate business, must be struck down.

---

States with other forms of discrimination (*e.g.*, tax incentives for investments which either do not apply to foreign insurers or, although technically applicable to foreign insurers, are practically unavailable to them) include:

| | | |
|---|---|---|
| Colorado | Louisiana | New Mexico |
| Georgia | Montana | South Dakota |
| Idaho | Nevada | West Virgina |

For a listing of the statutory authorities supporting these tabulations, *see*, J.S. App. at 69a-70a.

## ARGUMENT

In deciding *Western & Southern*, the Court enunciated the rule which must be applied to determine whether Alabama's discriminatory premiums tax on foreign life insurers violates the Equal Protection Clause of the Fourteenth Amendment.

> We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.

451 U.S. at 667-68.

The unfairness of domestic preference taxes from the standpoint of multistate and nationwide insurers who are members of LICONY is apparent. More significant, however, is the fact that such taxes appear at odds with the fundamental precepts of our federal system.

Domestic preference taxation such as the Alabama premiums tax on foreign life insurance companies fails to pass the rational basis test enunciated in *Western & Southern* since the corporate domicile of a foreign life insurance company has no meaningful relationship to the type of business it does in the taxing state, to the services it receives from the taxing state or to the ability of the company to bear the burden of the tax. Accordingly, this Court has on at least five occasions held domestic preferences taxes to be unlawful under the Equal Protection Clause. *See, WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119-20 (1968); *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572 (1949); *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494, 511 (1926); *Southern Railway Co. v. Greene*, 216 U.S. 400, 418 (1910).



Alabama's domestic preference tax on foreign life insurance companies also constitutes a form of "taxation without representation" that is wholly inconsistent with the founding principles of this country. The Supreme Judicial Court of Massachusetts aptly noted this problem in the course of invalidating a Massachusetts tax creating a domestic preference.

> 'Since nonresidents are not represented in the taxing State's legislative halls . . . judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution.'

*Mary C. Wheeler School, Inc. v. Board of Assessors*, 368 Mass. 344, 349, 331 N.E.2d. 888, 891 (1975) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) ). The power to obtain additional revenue from companies of other states is a dangerous power to concede to the states precisely because it lacks the checks and balances inherent when the state's own corporations must bear an equal burden. *See Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365, 1372 (1983).

Finally, taxes like Alabama's domestic preference tax on foreign life insurance companies attach a permanent disability to such companies solely because they are domiciled outside the taxing state. In effect, no matter how great a contribution such companies make to the local economy by way of employment or otherwise, they are generally placed at a substantial, and continuing, competitive disadvantage to domestic life insurance companies in the area of taxation. This distorts the competitive market in the taxing state to the detriment of local consumers. In addition, the effects of such taxes are exported to the purchasers of insurance in nondiscriminatory states, including their states of incorporation. Any attempt by one state to coerce the companies of another state to change their place of incorporation in order to obtain equal tax treatment raises issues of comity as well as fairness. If unchecked, such

attempts could well lead to the further proliferation of discrimination and retaliation.[3]

In this case, the Alabama courts held that two purposes in addition to raising revenue could sustain the domestic preference tax: encouraging the formation of insurance companies in Alabama and promoting capital investment in Alabama by foreign companies. *See* J.S. App. at 9a. None of these purposes, however, is sufficient to justify discrimination against foreign corporations in the field of taxation. If they were, each of the domestic preference taxes invalidated by this Court on the basis of equal protection would have been sustained under the conceivable basis test. *Compare, e.g., Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-72 (1949), *with Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 583-86 (1935). More importantly, if such purposes were held to be legitimate justifications for domestic preference taxes, states seeking to raise extra revenue from out-of-state companies would be free to do so with impunity on the pretext of pursuing less objectionable goals. Simply put, discrimination against out-of-state companies has nothing to do with raising revenue.

Legitimate efforts by states to promote local industry or to attract out-of-state businesses are certainly not prohibited. The two primary purposes used by the Alabama courts to support Alabama's discriminatory tax could readily be accomplished by measures aimed more directly at the state's specific goals. For example, Alabama could certainly encourage insurance companies to do business within its borders by establishing a favorable regulatory climate, by offering nondiscriminatory tax advantages to insurance companies generally, or even, as some states have done, by offering foreign companies a tax

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3 In the enactment of Hawaii's domestic preference tax in 1953, the Senate Committee on Ways and Means noted:

> The purpose of this bill is to give domestic insurance companies preferential treatment in insurance taxes since practically all foreign insurance companies doing business within their own states receive preferential tax treatment at home.

Stand. Comm. Rep. No. 538, 1953 Haw. Senate Journal 770.



*advantage* to induce them to enter the state. *See, e.g.*, N.Y. Tax Law § 187 (Consol. 1971, repealed 1974); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 529 (1959) (higher tax on residents than on nonresidents sustained). The goal of attracting investment to the state could also be achieved quite easily without discrimination. There is no reason why, for example, Alabama could not have a uniform premiums tax rate equally applicable to foreign and domestic companies alike while offering a reduced rate of tax to any company qualifying on the basis of an amount of Alabama investments related directly to the level of its business in Alabama when compared to the level of its business everywhere. In this way, the State could, without subjecting foreign insurers to an invidious competitive disadvantage, encourage the reinvestment in Alabama of premiums received on policies issued in the State. At the same time, domestic companies would have an incentive not to invest too much out-of-state.

Significantly, the National Association of Insurance Commissioners considered and recognized the evils of domestic preference taxes in 1970 when it *unanimously* adopted a resolution calling for their elimination.

> While such discrimination may have been justified when insurance was an 'infant industry' in some parts of the country, it is an anachronism today. It distorts competition by subsidizing some competitors, allocates tax burdens unfairly among policyholders, ignores the national nature of much of the contemporary insurance economy, and is likely to impel major insurers to make corporate or marketing changes which will enable them to escape the discrimination but which are not in the interest of a healthy insurance business functioning efficiently in the public interest.

1971 NAIC Proceedings, vol. I at 70. These obvious defects of domestic preference taxes far outweigh any putative benefits that enacting states might hope to derive from them. It is a strange paradox that many of the states whose insurance commissioners voted in favor of the NAIC policy resolution in

1970 should, in the first place, have taken no action in the intervening years to enact remedial legislation and, today, find themselves in the anomalous position of having to attempt to support an outrageous and insidious form of general discrimination among taxpayers which is not supported by a single decision of this Court.

Early in its history, this Court recognized that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignity." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839). The five Equal Protection cases cited above at page 4 of this Brief clearly illustrate the proposition that once a foreign corporation is admitted to do business in a state other than its state of incorporation, it enjoys the same equal protection of the laws as the domestic corporations of the admitting state. This Court should now reaffirm this fundamental proposition by declaring the Alabama domestic preference tax to be in violation of the Equal Protection Clause.

## CONCLUSION

For the reasons stated, the decision of the Alabama Supreme Court should be reversed.

Dated: June 19, 1984

Respectfully submitted,

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# APPELLANT'S

# BRIEF

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---

**On Appeal from the Supreme Court of Alabama**

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## QUESTION PRESENTED

Whether Alabama's domestic preference tax statute, under which Alabama insurance companies are taxed at a lower rate than out-of-state companies, violates the Equal Protection Clause of the Fourteenth Amendment.

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In The

# Supreme Court of the United States

October Term, 1983

No. 83-1274

Metropolitan Life Insurance Company, *et al.*,
*Appellants,*

v.

W. G. Ward, Jr., *et al.*,
*Appellees.*

On Appeal from the Supreme Court of Alabama

## BRIEF FOR APPELLANTS

## OPINIONS BELOW

The judgment of the Supreme Court of Alabama on rehearing, which is not reported, appears in the Appendix to the Jurisdictional Statement (J.S. App.) at 1a. The opinion of the Court of Civil Appeals of Alabama, which is reported at 437 So.2d 535 (1983), appears at J.S. App. 4a. The unreported opinion of the Circuit Court for Montgomery County, Alabama appears at J.S. App. 13a.*

* A list of the parties below appears in the Appendix to this Brief at 1a to 2a. By letter to the Court of May 24, 1984, seven of the appellant companies—Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Twin City Fire Insurance Company, Hartford Life and Accident Insurance Company, Hart-

## JURISDICTION

The Supreme Court of Alabama denied petitions for a writ of certiorari to review the decision of the Court of Civil Appeals of Alabama on September 23, 1983. On November 10, 1983, the Supreme Court of Alabama granted rehearing, granted the writ of certiorari, and entered a final judgment upholding the constitutionality of the Alabama domestic preference tax statute, Ala. Code § 27-4-4 (1975), as applied to appellants.

A notice of appeal to this Court was duly filed in the Supreme Court of Alabama on December 8, 1983. Pursuant to an order entered by Justice Powell on December 12, 1983, which extended the time for docketing the appeal to 90 days from the date of the judgment on rehearing below, the appeal was docketed on February 1, 1984. Probable jurisdiction was noted on April 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1982).

## CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and of the Alabama Code are set forth in the Appendix to this Brief at 3a to 12a.

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ford Casualty Insurance Company, Hartford Life Insurance Company, and Hartford Variable Annuity Life Insurance Company—waived their right to file a brief on the merits in this case. This Brief is submitted on behalf of the remaining appellant companies.

Pursuant to Rule 28.1 of the Rules of this Court, the corporate parents, subsidiaries and affiliates of the appellants were listed in the Supplemental Appendix filed with the Jurisdictional Statement. That listing is updated as follows: Met First Financial Company should be listed as a partially-owned subsidiary of Metropolitan Life Insurance Company; Arvida Resort Management Inc. and Arvida Mortgage Company should be listed as partially-owned subsidiaries of The Equitable Life Assurance Society of the United States.



## STATEMENT

Since 1955, the State of Alabama has granted a preference to domestic insurance companies by imposing a substantially lower gross premiums tax rate on Alabama companies than on out-of-state (foreign) companies.[1] Under the domestic preference tax scheme now in force in Alabama, foreign life insurance companies pay a gross premiums tax rate of three percent. Foreign companies selling other forms of insurance, such as property and casualty insurance, pay four percent. Ala. Code § 27-4-4(a) (1975). Domestic companies, by contrast, pay a rate of only one percent on all forms of insurance premiums. *Id.* § 27-4-5(a).[2] As a result, a foreign com-

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[1] The origins of this discrimination date back to 1849, when the first premiums tax on insurance companies doing business in Alabama was limited to "companies not chartered by this state." Act No. 1 [1849] Ala. Acts 3. From 1876 to 1907, the state taxed foreign and domestic companies on a virtually equal basis. *See, e.g.*, Code of 1876, § 369(2), (3). The domestic preference tax reappeared in 1907 and continued in various forms for the next 38 years. In response to this Court's decision in *United States v. South-Eastern Underwriters' Association*, 322 U.S. 533 (1944), the state in 1945 restored general equality in the taxation of foreign and domestic insurers. Act No. 156 [1945] Ala. Acts 190. In 1955, the domestic preference tax was reinstated, Act No. 77 [1955] Ala. Acts 193 (3d Sp. Sess.), and, with minor amendments and tax rate changes, has remained in effect to the present day. *See* Ala. Code §§ 27-4-4, 27-4-5 (1975).

For domestic preference tax purposes, Alabama defines a domestic insurer as a company which (1) is incorporated in Alabama and (2) has its principal office and chief place of business in the state. *Id.* § 27-4-1(3). Correspondingly, a company is categorized as a foreign insurer if it either (1) is incorporated outside Alabama or (2) has its principal office or chief place of business outside the state. *Id.* § 27-4-1(2). This two-part definition, which is widely used, *see Western & Southern Life Insurance Co. v. State Board of Equalization*, 99 Cal. App. 3d 410, 413 n.1, 159 Cal. Rptr. 539, 541 n.1 (1979), *aff'd*, 451 U.S. 648 (1981), was added to the Alabama Code in 1969.

[2] There are two exceptions to the general rules stated in the text. One is for annuity considerations, on which the tax rate

pany doing the same type and volume of business in Alabama as a domestic company will generally pay three to four times as much in gross premiums taxes as its domestic competitor.[8]

The domestic preference tax statute does provide that foreign companies may reduce the discriminatory differential by investing prescribed percentages of their total worldwide assets in specified investments in the State of Alabama. For example, by investing ten percent or more of its total admitted assets in statutorily prescribed Alabama investments, a foreign life insurer can reduce its gross premiums tax rate from three percent to two percent. Similarly, a foreign property and casualty insurer can reduce its tax rate from four percent to three percent by investing ten percent or more of its admitted assets in Alabama investments. Lesser tax reductions are possible based on lesser percentages of

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is one percent for both foreign and domestic companies. *Id.* The other is for wet marine and transportation insurance, which is also taxed in a nondiscriminatory fashion. *Id.* § 27-4-6.

[8] A gross premiums tax, as the name implies, is imposed on the total premiums received by a company on risks in a given state, without deduction for losses paid or other costs of doing business. A relatively low rate of tax on gross premiums will usually be equivalent to a much higher rate of tax on net income. *See, e.g., Metropolitan Life Insurance Co. v. Commissioner*, Nos. 31965, 31966 (D. Ct. N.D. May 23, 1983), *app. pending*, Nos. 10510, 10517 (N.D.) (reprinted at J.S. App. 38a, 46a).

In addition to the disparity in premiums tax rates, the Alabama statute also grants domestic companies a preference with respect to credits for *ad valorem* taxes paid in Alabama. A domestic company is entitled to a credit against the premiums tax for *ad valorem* taxes paid on its "principal office in the state," whether occupied in whole or in part, as well as for *ad valorem* taxes paid on any property in the state, other than the company's principal office, which is at least 50 percent occupied by the domestic insurer. Ala. Code § 27-4-5(b) (1975). A foreign company receives this credit only for property which is at least 50 percent occupied by the foreign insurer. *Id.* § 27-4-4(d)(1).



investment, with each one percent of worldwide admitted assets invested in Alabama yielding a reduction of one-tenth of one percent in the tax rate. *Id.* § 27-4-4(b).

Regardless of the amount invested in the state, however, foreign life insurance companies can never pay a gross premiums tax rate of less than two percent, and other foreign insurance companies can never pay a tax rate of less than three percent. By contrast, domestic companies are automatically entitled to a tax rate of one percent, even if they have virtually no investments in the state. In other words, the investment provision only permits foreign companies to reduce—but never eliminate—the discrimination inherent in the domestic preference tax statute.[9]

In May 1981, this Court made possible a constitutional challenge to domestic preference taxes such as Alabama's by repudiating the so-called "privilege tax" doctrine of *Lincoln National Life Insurance Co. v. Read*, 325 U.S. 673 (1945), which had theretofore shielded such laws from scrutiny under the Equal Protection Clause. *See Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 667 (1981).[10]

Appellants, which are all insurance companies incorporated outside the State of Alabama, filed claims with

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[9] Moreover, such reductions as are available require levels of investment that are unrelated to the percentage of a foreign insurer's business done in Alabama. For example, the investment required to lower a foreign company's tax rate by one percentage point is ten percent of the company's total admitted assets, whether the company does most of its business, or only a tiny fraction of its business, in Alabama.

[10] Under the "privilege tax" doctrine, a state tax imposed on a foreign corporation for the privilege of doing business in the state was considered to be outside the purview of the Equal Protection Clause, because such a tax was deemed a condition on the foreign corporation's right to enter the state.

the Alabama Department of Insurance in 1981, contending that the Alabama domestic preference tax statute was unconstitutional as applied to them. Appellants sought refunds of domestic preference taxes paid to Alabama for tax years 1977 through 1980. On July 8, 1981, the Commissioner of Insurance denied all such claims.

In August 1981, appellants appealed the Commissioner's orders to the Circuit Court for Montgomery County, Alabama, seeking a judgment declaring the domestic preference tax statute unconstitutional and requiring the Commissioner to make appropriate refunds. *E.g.*, Joint Appendix (J.A.) at 12-18. After intervention by a number of domestic insurance companies, the Circuit Court consolidated the various appeals and, with the consent of the parties, selected two claims as lead cases to be treated as binding on all claimants.[6] Following submission of cross-motions for summary judgment, the trial court ruled on May 17, 1982, that the statute was constitutional. Invoking the equal protection standard articulated by this Court in *Western & Southern*, the court held that the domestic preference tax statute had legitimate state purposes and that the distinction in the statute between foreign and domestic companies was rationally related to those purposes. The court identified the asserted legitimate state purposes as being, "in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute." J.S. App. 20a-21a.[7] Based on

[6] Metropolitan Life Insurance Company, a New York corporation, was chosen as representative of the life insurance claimants, and the Prudential Property and Casualty Insurance Company, a New Jersey corporation, was selected to represent the non-life claimants. J.A. at 314-15.

[7] The court also adverted to the possible existence of "other, additional legitimate state purposes," J.S. App. 21a, but did not specify what those purposes might be.



the evidence presented, which included affidavits of experts for both sides, the court concluded that "the Alabama legislature could have reasonably believed that the statute's classification would promote the foregoing purposes." J.S. App. 21a.

Following an unsuccessful motion for a new trial, the foreign companies appealed the trial court's decision to the Court of Civil Appeals. On April 27, 1983, the appellate court affirmed the lower court's holding on the legitimate state purpose issue, but remanded the case for an evidentiary hearing on the rational relationship issue, ruling that summary judgment was inappropriate where the evidence below was in conflict. J.S. App. 12a.

Appellants petitioned the Supreme Court of Alabama for certiorari, seeking review of the Court of Civil Appeals' ruling on the legitimate state purpose issue. The State of Alabama and the intervening domestic insurance companies petitioned for review of the remand order. In their pleadings in the Supreme Court of Alabama, appellants waived their right to an evidentiary hearing on the rational relationship issue, and requested a final determination of the legal issues regarding their equal protection challenge to the state tax. On September 23, 1983, the Supreme Court of Alabama denied all the petitions for certiorari, thus leaving it unclear on the record whether its order was intended to be a final judgment or to leave the lower court's remand order standing. Subsequently, to avoid an unnecessary evidentiary hearing on the rational relationship issue, appellants again waived their right to a hearing and filed a joint motion with all other parties seeking rehearing by the Supreme Court of Alabama and entry of a final judgment that would be immediately appealable. This motion was granted on November 10, 1983, and this appeal followed. On April 16, 1984, the Court noted probable jurisdiction.

## SUMMARY OF ARGUMENT

I

Seven times in the past 75 years this Court has held *domestic* preference taxes invalid under the Equal Protection Clause of the Fourteenth Amendment.* The rule that emerges from these cases is simple and straightforward: in the area of taxation, the right of a nonresident corporation is the right to equal treatment with the corporate domiciliaries of the taxing state. No legitimate state objective can justify the imposition of more onerous tax burdens on foreign companies as a class merely because of their status as corporate residents of another state.

This well-established principle notwithstanding, more than half the states presently maintain some form of domestic preference tax on insurance companies. *See* J.S. App. 69a-70a. These taxes originated, and have been sustained, on the basis of the so-called "privilege tax" doctrine, under which the Equal Protection Clause was long held not to apply to taxes imposed on a foreign corporation for the privilege of doing business within the state. *See Lincoln National Life Insurance Co. v. Read*, 325 U.S. 673 (1945); *Philadelphia Fire Association v. New York*, 119 U.S. 110 (1886). For almost a century, that doctrine effectively prevented an equal protection challenge to the most significant domestic preference taxes imposed on insurance companies, namely, the heavily discriminatory gross premiums taxes applied to foreign insurers in many states in the form of privilege taxes.

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* *WHYY, Inc. v. Glassboro*, 393 U.S. 117, 119-20 (1968); *Reserve Life Insurance Co. v. Bowers*, 388 U.S. 358 (1967) (*per curiam*); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572 (1949); *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535, 545 (1934); *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494, 510 (1926); *Southickson Motors Corp. v. Floyd*, 256 U.S. 421, 426 (1921); *Southern Railway v. Greene*, 216 U.S. 400, 418 (1910).



The present case, which challenges the domestic preference tax in Alabama, arose because this Court, in 1981, overturned the privilege tax doctrine and announced that taxes and other burdens imposed by a state on foreign corporations would no longer be shielded from traditional equal protection scrutiny. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 667-68 (1981). In light of that decision, it is apparent that the legal underpinnings of domestic preference taxation have collapsed. The precedents of this Court make clear that such taxes are fundamentally inconsistent with the Equal Protection Clause. *See* cases cited in note 8 *supra*. Moreover, the decisions of the state and federal appellate courts, both before and after *Western & Southern*, are virtually unanimous in reaching the same result. *See* cases cited at page 21 *infra*. These decisions are supported not only by the force of *stare decisis*, but by elemental principles of justice and equity as well.

II

Appellees seek to escape the application of these principles by invoking the broad power of states to create reasonable classifications for purposes of taxation. This response is off the mark, however. The imposition of a tax burden on nonresident companies that the state is unwilling to make its own companies share is manifestly incompatible with the basic premises of equal protection. Under the Alabama tax scheme, foreign and domestic companies engaged in the same line of business can pay taxes at rates varying by as much as 300 percent. Yet the State does not offer foreign companies any greater services, nor does it grant foreign companies any greater privileges, than it provides to domestic companies of the same kind. The principal object of the law thus appears to be the generation of additional revenue solely at the expense of out-of-state insurers.

It does not suffice to argue, as the State does here, that this discrimination may be ameliorated if a for-

eign company invests a specified percentage of its total assets in Alabama. First, this so-called "investment incentive" provision does not apply to domestic companies at all. Second, because this provision focuses on the *percentage* of a company's assets that are invested in the state, it significantly disadvantages companies that do a nationwide business. The premise implicit in this provision is that a dollar invested by a large insurer with assets distributed across the country is less important to the state than a dollar invested by a company with fewer assets in other jurisdictions. Most tellingly, however, the investment provision never permits a foreign company to eliminate the entire difference between its tax rate and the rate applied to domestic companies. Put simply, no matter how much money a foreign company invests in Alabama, it can never achieve equal treatment with its Alabama competitors.

Nor can the State justify the discrimination practiced here on the basis of a purpose to promote the location of insurance companies in the state. Even if the domestic preference tax can be presumed to have such an effect, this purpose is not a legitimate basis for placing out-of-state companies at a permanent disadvantage in taxation. Appellees have not shown, nor could they, that the residence of an insurance company is, in and of itself, a fair and reasonable indicator of whether a company deserves the benefits of a substantial tax advantage. This asserted purpose is little more than a restatement of the classification it is said to justify. In this regard, it is significant that the purpose to promote the location of insurance companies in the state has previously been advanced as a justification for domestic preference taxation, and has been rejected outright by this Court. *See* pages 34-36 *infra*, discussing *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965).

In short, Alabama's domestic preference tax statute is unquestionably invalid. As this Court observed in its



seminal decision on the issue, domestic preference taxation "does violence to the Federal Constitution." *Southern Railway v. Greene*, 216 U.S. 400, 418 (1910). Because of the demise of the privilege tax doctrine, the opportunity has arisen for these anachronistic taxes to be consigned to history, as they should have been long ago. The decision below, which upheld Alabama's discriminatory tax against appellants' equal protection challenge, should therefore be reversed.

## ARGUMENT

### I. THE EQUAL PROTECTION CLAUSE PROHIBITS DOMESTIC PREFERENCE TAX LAWS SUCH AS ALABAMA'S

In an unbroken line of precedents stretching back to 1910, this Court—and the appellate courts of the various states—have consistently held that the Equal Protection Clause of the Fourteenth Amendment, where it applies, prohibits a state from imposing taxes that discriminate against nonresident corporations that have been duly admitted to do business in the state.[9] While distinctions based on out-of-state residence have been upheld for some police power and other purposes, residence has never been sanctioned as a sufficient basis in and of itself for imposing a heavier tax on foreign companies than on domestic companies. Because the decision below departs from this well-established principle, it should be reversed.

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[9] The principle underlying this rule has ancient antecedents. The Book of Leviticus commands: "Ye shall have one manner of law, as well for the stranger, as for one of your own country." Lev. 24:22 (King James Version) (quoted in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974)).

### A. Where the Equal Protection Clause Has Been Found Applicable, the Decisions of This Court Have Repeatedly Invalidated Domestic Preference Tax Laws

Prior to this Court's decision in *Western & Southern*, it had long been held that a state tax imposed on a foreign corporation for the privilege of doing business in the state was not subject to review under the Equal Protection Clause, because such a tax was merely a condition on the foreign corporation's right to enter the state. *See, e.g., Lincoln National Life Insurance Co. v. Read*, 325 U.S. 673 (1945); *Philadelphia Fire Association v. New York*, 119 U.S. 110 (1886). Since insurance companies are not protected by either the Commerce Clause,[10] or the Privileges and Immunities Clause,[11] the doctrine of *Lincoln National* left foreign insurers essentially defenseless against state domestic preference tax laws, so long as such laws were cast in the form of privilege taxes.

At the same time, however, this Court had developed a separate line of precedents establishing that, where the Equal Protection Clause *was* applicable—that is, in those situations where the "privilege tax" rationale could not be relied upon—state taxes which discriminated against nonresident corporations were *per se* invalid. In *Southern Railway v. Greene*, 216 U.S. 400 (1910), for example, the Court invalidated an Alabama tax imposed solely on foreign corporations, applying the equal protection test that statutory classifications must bear a "reasonable and just relation" to the purpose for which

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[10] The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), lifted all Commerce Clause restrictions on the taxation and regulation of insurance companies by the states. *See Western & Southern*, 451 U.S. at 654-55.

[11] *See id.* at 656; *Hemphill v. Orloff*, 277 U.S. 537, 548-50 (1928) (Privileges and Immunities Clause inapplicable to corporations).



they are enacted. *Id.* at 417. "We hold," the Court announced, ". . . that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution." *Id.* at 418.[12]

The next significant case in this line of precedents—*Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494 (1926)—"extended the protections of *Southern Railway* against discriminatory taxation to corporations holding short-term licenses, and to those without substantial permanent property in the State." *Western & Southern*, 451 U.S. at 664. Although the foreign insurance company plaintiff in *Hanover Fire* had very little fixed investment in the state, and had a mere annual license to do business, 272 U.S. at 508, 509, 514-15, the Court held that, with respect to the imposition of taxes, "the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind." *Id.* at 511.[13]

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[12] In 1923, this Court emphasized the weight it attached to *Southern Railway* by citing that case, among others, in dismissing for want of jurisdiction an appeal by Oklahoma from a decision of the Eighth Circuit holding an Oklahoma domestic preference tax invalid. *Leecraft v. Texas Co.*, 262 U.S. 732 (1923), *dismissing appeal from* 281 F. 918 (8th Cir. 1922). *See also Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 426 (1921) (holding invalid on equal protection grounds a tax that discriminated against nonresident manufacturing companies).

[13] The ruling in *Hanover Fire* was expressly reaffirmed in *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535 (1934), where the Court held invalid a further attempt by Illinois to deny a foreign insurer the benefit of the reduced valuation applied to domestic companies' personal property. "[A] foreign fire insur-

In *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), the Court applied the same principle to invalidate an Ohio law that imposed an *ad valorem* tax on certain accounts receivable of nonresident corporations where no similar tax was applied to identical property of Ohio citizens and companies. "[W]e have held," the Court observed, "as to taxation of intangibles, that the federal right of a nonresident 'is the right to equal treatment.'" *Id.* at 572 (quoting *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)). Since domestic corporations in Ohio were exempt from the tax applied to out-of-state companies, the Court found it "obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner." *Wheeling Steel*, 337 U.S. at 572.

More recently, the Court in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), reversed *per curiam* an Ohio decision upholding a personal property tax imposed on foreign insurance companies but not on domestics, citing *Wheeling Steel* as the controlling precedent. Similarly, in *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968), the Court overturned a state tax measure which discriminated against out-of-state nonprofit corporations, stating that "while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, 'the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their prop-

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erty is entitled to an equally favorable *ad valorem* tax basis.'" *Id.* at 119 (quoting *Wheeling Steel*, 337 U.S. at 571-72).



It was thus the general rule, as of 1981, that a state could not discriminate against nonresident corporations as a class in the area of taxation without violating the Equal Protection Clause. The "privilege tax" exception to this rule, however, greatly limited its practical significance, since this Court had held in *Lincoln National* that a tax on the privilege of a foreign corporation to do business in the state was exempt from equal protection review. In *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), the Court resolved this anomalous situation by abandoning the *Lincoln National* doctrine. "In view of the decisions of this Court both before and after *Lincoln National*," the Court stated, "it is difficult to view that decision as other than an anachronism." *Id.* at 667.

In place of the discarded doctrine of *Lincoln National*, the Court announced that review under the Equal Protection Clause of state tax measures affecting foreign corporations would henceforth be governed by traditional equal protection standards, regardless of the form in which the tax statute was cast. "We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.* at 667-68. The standard for measuring such distinctions, the Court said, should be whether the " 'classification . . . rest[s] on differences pertinent to the subject in respect of which the classifi-

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sive company, by reason of being such, [is subjected] to a tax burden 66 2/3% greater than that laid on other personal property." the Court noted. "No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494." 292 U.S. at 543 (emphasis added).

cation is made.'" *Id.* at 668 (*quoting Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 494 (1927)).[14]

Applying this traditional test to domestic preference taxes such as Alabama's, there can be no doubt that such taxes are invalid. This Court has repeatedly held them unconstitutional under the Equal Protection Clause over a period of almost 75 years.[15] If domestic preference taxes were justified by any conceivable legitimate state purpose, such a purpose would long ago have been found sufficient to support the taxes this Court has overturned. Yet, except for the "privilege tax" cases, this Court has never sustained a domestic preference tax against an equal protection challenge.

Although this point was pressed vigorously below, the lower courts failed to discuss or even cite this Court's decisions holding domestic preference taxes invalid. In

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[14] In *Western & Southern*, the Court upheld a retaliatory tax law against Equal Protection and Commerce Clause challenges. Such laws, which exist in virtually all the states, typically provide that the retaliating state will retort the actions of other states in placing burdens on the retaliating state's companies. Thus, in *Western & Southern*, since the tax burden on California insurers doing business in Ohio was higher than the tax burden California would otherwise impose on Ohio insurers, California, under its retaliatory law, imposed the higher burden on companies from Ohio. This Court sustained the California retaliatory tax as a means of "promot[ing] the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes." 451 U.S. at 668.

[15] *See note 8 supra.* The same principle has been affirmed in dictum. In *Shaffer v. Carter*, 252 U.S. 37 (1920), for example, the Court stated: "[W]e deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effort, upon income accruing to non-residents from their property or business within the State, or their occupations carried on therein . . . ." *Id.* at 52 (emphasis added).



their Motion to Dismiss or Affirm, the intervening Alabama companies seek to rationalize this failure by arguing that the *Southern Railway* line of cases was "overruled by implication" in *Western & Southern*. Motion to Dismiss or Affirm of Appellees American Educators Life Insurance Company, *et al.*, at 7 & n.4.[16] This contention is unsupportable, however, since the very decisions supposedly overruled in *Western & Southern* were cited and quoted with approval throughout the majority opinion in that case. 451 U.S. at 662-67. Indeed, on this point, which is crucial to the disposition of this case, the Court was unanimous. The dissenting Justices in *Western & Southern* stated without qualification that "mere difference in residence is admittedly an insufficient reason for disparate [tax] treatment," and cited as authority both the majority opinion and one of the decisions intervenors now assert was overruled *sub silentio* in that majority opinion. *Id.* at 676 & n.4 (Stevens, J., dissenting) (*citing id.* at 667-68; *Wheeling Steel*, 337 U.S. at 572).

The State attempts to avoid the impact of this Court's decisions with its contention that, by upholding the validity of California's retaliatory tax under the Equal Protection Clause, the *Western & Southern* decision necessarily indicated that domestic preference taxes are valid as well. Motion to Dismiss or Affirm of the Commissioner at 11 & n.8. This argument, however, ignores the crucial differences between a retaliatory tax and a domestic preference tax. First, as the Court itself recognized in *Western & Southern*, the purpose of retaliatory tax laws is "to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes." 451 U.S. at 668. The

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[16] The Alabama companies' motion will be cited hereafter as "Motion to Dismiss or Affirm of Intervenors at ——." The State's motion will be cited as "Motion to Dismiss or Affirm of the Commissioner at ——."

effect of domestic preference taxes, by contrast, is just the opposite—to promote domestic industry by erecting barriers to interstate business. Second, as the Court was careful to point out in *Western & Southern*, "it is clear that the purpose [of retaliation] is not to generate revenue at the expense of out-of-state insurers." *Id.* at 669. Obviously, the same cannot be said of domestic preference taxes; their most fundamental characteristic is the imposition on foreign companies of a tax burden that the state is unwilling to impose on its own companies.

Finally, these two types of taxes are plainly distinguished by the nature of the respective classifications involved. A domestic preference tax treats foreign companies as a single class, and discriminates against all of them. A retaliatory tax, on the other hand, differentiates companies on the basis of the laws in effect in their home states, not on the basis of residence *per se*. As the Court observed in *Western & Southern*, "The retaliatory tax is not imposed on foreign corporations qua foreign corporations, as would be expected were the purpose of the tax to raise revenue from noncitizens; rather, it is imposed only on corporations whose home states impose more onerous burdens on California insurers than California otherwise would impose on those corporations." *Id.* at 670 n.23. The assertion that *Western & Southern* upheld domestic preference taxation thus does not stand analysis.

Equally unavailing is the claim that the Court's precedents invalidating domestic preference taxes are distinguishable on their own terms. The State asserts, for example, that *Southern Railway* and *Hanover Fire* are inapplicable here because "both were decided prior to the enactment of the McCarran-Ferguson Act, [and thus] Commerce Clause as well as Equal Protection Clause concerns were at stake." Motion to Dismiss or Affirm of the Commissioner at 13-14 n.10. This assertion is doubly incorrect. First, in both cases the Court's holding was



premised only on the Equal Protection Clause, with no mention of the Commerce Clause. *See* 216 U.S. at 418; 272 U.S. at 516. Second, and perhaps more notably, Commerce Clause concerns were *completely* irrelevant in *Hanover Fire*, since the plaintiff in that case was an insurance company, and in 1926 the business of insurance was not considered to be commerce and hence was not subject to the Commerce Clause. *Compare United States v. South-Eastern Underwriters' Association*, 322 U.S. 533 (1944) *with New York Life Insurance Co. v. Deer Lodge County*, 231 U.S. 495 (1913).

The State's attempts to distinguish other cases from the *Southern Railway* line are equally wide of the mark. Nowhere has the State pointed out any significant difference between the facts of those cases and the facts presented here. Nor has the State been able to demonstrate that the legal issue posed in those cases—whether a domestic preference tax is permissible under the Equal Protection Clause—differs materially from the issue in this case.

An example of the State's attempts to minimize the past decisions of this Court is its treatment of *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), which invalidated an Ohio domestic preference tax on insurance companies. In asking this Court to disregard *Reserve Life*, the State invokes the principle of *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), that summary affirmances are entitled to little precedential weight. *See* Motion to Dismiss or Affirm of the Commissioner at 16. But that principle has no application to *Reserve Life*, which was not a summary affirmance, but a plenary reversal. Contrary to the State's apparent understanding, the *Reserve Life* case was fully briefed on the merits, argued to the Court, and decided in a *per curiam* opinion. It is thus entitled to as much dignity as any other fully considered decision of this Court.

Similarly flawed is the State's argument that the *Reserve Life* Court did not finally dispose of the equal protection question raised here, but merely "remanded the case to be considered in the light of *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949)." Motion to Dismiss or Affirm of the Commissioner at 15 (emphasis in original). The *per curiam* opinion in *Reserve Life*, *see* 380 U.S. at 258, expressly *reversed* the decision of the Ohio Court of Appeals, nowhere suggesting that the accompanying remand left the federal constitutional issue unresolved. Where the Court *vacates* a judgment and remands the case for further consideration in light of another opinion, its practice is to say so explicitly. *See, e.g., Santos* v. *Texas*, 380 U.S. 259 (1965), decided the same day as *Reserve Life*. *Reserve Life* thus necessarily decided the issue presented here. Moreover, the *Reserve Life* Court's citation to *Wheeling Steel*—then a venerable precedent of 16 years—can only have been intended to indicate that the Court regarded that precedent as dispositive on this issue. *See also WHYY, Inc.* v. *Glassboro*, 393 U.S. at 119 (citing *Wheeling Steel* and *Reserve Life* in invalidating a *New Jersey* domestic preference tax law).

There can thus be no question that, over the past 75 years, the Court has faced, and repeatedly resolved, the issue presented here. In light of the well-established doctrine of *stare decisis*, which applies with special force when a principle of law has been consistently adhered to over a long period of time, *see, e.g., United States* v. *Barnett*, 376 U.S. 681, 699 (1964); *Gore* v. *United States*, 357 U.S. 386, 392 (1958), the lower courts plainly erred in upholding the challenged tax.

### B. The Decisions of Other Courts Have Consistently Reached the Same Result

The fundamental nature of the principle that domestic preference taxes violate the Equal Protection Clause is underscored by the consistent line of authority from both



state and federal courts holding such taxes invalid. *See, e.g., Department of Revenue* v. *Amerep Corp.*, 350 So.2d 1343 (Fla. 1978); *Mary C. Wheeler School, Inc.* v. *Board of Assessors*, 368 Mass. 344, 331 N.E.2d 889 (1975); *Cleveland-Cliffs Iron Co.* v. *Department of Revenue*, 329 Mich. 225, 45 N.W.2d 46 (1950); *American Youth Foundation* v. *Township of Benona*, 37 Mich. App. 722, 195 N.W.2d 304 (1972); *Missouri Pacific Railroad* v. *Kirkpatrick*, 632 S.W.2d 129 (Mo. 1982); *Gilbert Associates* v. *Commonwealth*, 459 Pa. 514, 447 A.2d 944 (1982); *Columbia Gas Transmission Corp.* v. *Commonwealth*, 468 Pa. 145, 360 A.2d 592 (1976); *Ballard* v. *Farmland Industries, Inc.*, 603 S.W.2d 305 (Tex. Civ. App. 1980); *cf. In re Bacchus Imports, Ltd.*, 65 Hawaii 566, 572-74, 656 P.2d 724, 729-30 (1982) (dictum), *prob. juris. noted*, 103 S. Ct. 3109 (1983).[17] Indeed, a North Dakota statute which imposed a 2.5 percent gross premiums tax on foreign insurance companies, while placing a much lighter net income tax on domestic companies, was recently held unconstitutional on equal protection grounds by the District Court for the South Central Judicial District of North Dakota. *Metropolitan Life Insurance Co.* v. *Commissioner*, Nos. 81865, 81866 (May 23, 1983), *app. pending*, Nos. 10510, 10517 (N.D.) (reprinted at *J.S.* App. 39a). As a result of that decision, the North Dakota legislature promptly repealed its domestic preference tax statute and enacted a new, nondiscriminatory law.[18]

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[17] Before the enactment of the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1982), the lower federal courts had also consistently invalidated state domestic preference taxes. *See, e.g., Northwestern National Insurance Co.* v. *Lee*, 49 F.2d 276, 280 (D. Ore.), *aff'd sub nom. Averill* v. *Northwestern National Insurance Co.*, 284 U.S. 599 (1931) (*per curiam*); *Diesel* v. *Shaffer Oil & Refining Co.*, 33 F.2d 31, 34-35 (8th Cir. 1929); *Lowenyt* v. *Penn Co.*, 281 F. 918 (8th Cir. 1922), *app. dismissed*, 262 U.S. 732 (1923).

[18] *See* S.L. 1983, ch. 332, § 2; S.L. 1983, ch. 340, § 2; N.D. Cent. Code § 26.1-03-17(1). The trial court decision in North Dakota

The rationale for these decisions was aptly set forth in *Columbia Gas Transmission Corp. v. Commonwealth*, 468 Pa. 145, 360 A.2d 592 (1976). Addressing a discriminatory excise tax on foreign corporations, the Supreme Court of Pennsylvania concluded, "The Commonwealth has not stated, nor can we discern, any valid reason for the difference in the rates of taxation. Classifications based solely on place of incorporation, without any further justification, cannot stand constitutional scrutiny." *Id.* at 150, 360 A.2d at 595. The court went on to explain that the real motivation for Pennsylvania's unequal tax on foreign and domestic corporations appeared to be local favoritism. "The only basis for the disparate rates of tax imposed on foreign and domestic corporations by the excise taxes is that the Commonwealth apparently succumbed to 'the temptation to favor local business over foreign.'" *Id.* at 154-55, 360 A.2d at 597 (quoting Note, 88 U. Pa. L. Rev. 436, 436 (1940)).

The Supreme Judicial Court of Massachusetts sounded a similar theme in analyzing a state law granting a tax exemption to Massachusetts charitable corporations but not to foreign ones. "'Since nonresidents are not represented in the taxing State's Legislative halls,'" the court said, quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975), "'. . . judicial acquiescence in taxation schemes that burden them particularly would result them to such redress as they could secure through their own State . . . .'" *Mary C. Wheeler School, Inc. v. Board of Assessors*, 368 Mass. at 349, 331 N.E.2d at 891. Although the Massachusetts court recognized that the *Austin* case was decided under the Privileges and Immunities Clause, which does not apply to corporations, it also observed that "the equal protection clause, which does so apply . . . has been used to carry out the same policy in the cases involving corporate taxation." *Id.* at 350 n.4, 331 N.E.2d at 891 n.4.

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held the state's domestic preference tax law unconstitutional on a prospective basis only. The legislation which eliminated the domestic preference was made retroactive to January 1, 1982. An appeal by North Dakota concerning the validity of its now repealed domestic preference tax statute is pending in the Supreme Court of North Dakota, together with a cross appeal relating to the denial of refunds of taxes collected prior to 1982.



The most recent precedent in this area, *Missouri Pacific Railroad v. Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983), is particularly instructive. Applying the equal protection principles articulated in *Western & Southern*, the Missouri Supreme Court, sitting *en banc*, unanimously held that a domestication tax imposed on foreign corporations, under circumstances where similar domestic corporations were not required to pay the tax, failed the rational basis test. "[I]t is apparent that the challenged statute serves no legitimate purpose," the court observed. "The foreign corporation is, instead, taxed for carrying on business by a different and more onerous rule than is used in taxing domestic corporations for the same privilege. The consequence is a denial of equal protection. *See Southern Railway v. Greene*, 216 U.S. 400, 418 . . . (1910)." 652 S.W.2d at 133. The Missouri court plainly did not accept the notion, advanced here by appellees, that the *Western & Southern* decision sanctions domestic preference taxes. To the contrary, the *Kirkpatrick* decision confirms the continuing vitality of the rule that such taxes violate the Equal Protection Clause.

The decision below is thus squarely in conflict with a consistent and longstanding line of cases from other state courts. This fact notwithstanding, the Alabama courts made no effort to distinguish the many, well-reasoned decisions of other courts addressing this issue. Nor have appellees attempted to resolve the tension between those decisions and the result reached in this case. Instead, appellees have approached this issue as though the only question were whether the state's asserted purposes—promoting the Alabama domestic insurance industry and encouraging investment in Alabama—were, in the ab-

stract, permissible goals for a state to pursue. *See, e.g.*, Motion to Dismiss or Affirm of the Commissioner at 1-2 (Statement of Questions Presented). That is not the issue, however. Rather, the question is whether the assertion of such purposes justifies the imposition of more onerous taxes on nonresident companies, as a class, than on local companies. With the exception of the courts below, virtually every court, state or federal, to which this question has been posed has determined that domestic preference taxes violate the Equal Protection Clause. As the following section demonstrates, that result is clearly correct.

## II. THE COURTS BELOW ERRED IN HOLDING THAT ALABAMA'S DOMESTIC PREFERENCE TAX LAW IS JUSTIFIED BY LEGITIMATE STATE PURPOSES

The courts below, while conceding that Alabama's tax discriminates against foreign insurers, advanced several state purposes that were asserted to support the tax. As the Court of Civil Appeals summarized them, these purposes were: "in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama; and (2) encouraging capital investment by foreign insurance companies in Alabama assets and governmental securities." J.S. App. 8a. As will now be demonstrated, logic, history and the past decisions of this Court make it clear that these purposes do not justify the invidious discrimination inherent in a domestic preference tax.

### A. The Manifest Purpose of the Domestic Preference Tax—Raising Additional Revenue from Out-of-State Companies—Is Plainly Illegitimate

On its face, Alabama's domestic preference tax statute discloses an obvious purpose to "generate revenue at the expense of out-of-state insurers." *Western & Southern*, 451 U.S. at 669. This is not, however, a legitimate state



purpose. The imposition of a heavier tax on nonresident companies than on domestic companies frees the state from the political constraints of a generally applicable tax. As this Court recently observed:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency . . . . When the State singles out the press [i.e., a particular class of business], though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.

*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365, 1372 (1983). The threat of burdensome taxation is particularly troublesome where the class singled out for disfavored treatment lacks any representation in the taxing state's legislature. *See Mary C. Wheeler School, Inc. v. Board of Assessors*, 368 Mass. 344, 349, 331 N.E.2d 888, 891 (1975). Not only can the state raise revenues without the political burden of taxing its own citizens in an equivalent manner, but it can give local business a competitive advantage at the same time. In such circumstances, the level of the tax on nonresident companies is effectively limited only by the state's perception of what those companies will bear without being forced to abandon their business in the state.[19]

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[19] Aversion to such "taxation without representation" was a principal motivating force behind the American Revolution. As one Colonial pamphleteer put it,

> The security of the [nonvoting population of Great Britain] against oppression is that their oppression will fall also upon

In each of the domestic preference cases decided by this Court, a purpose to generate revenues from out-of-state companies was self-evidently present in the nature of the tax itself. Yet, this Court has never intimated that such a purpose would justify a state in imposing more onerous taxes on foreign companies than on similarly-situated domestic companies. To the contrary, the *Western & Southern* decision itself suggests that such a purpose is constitutionally impermissible. 451 U.S. at 669-70 & n.23. Given the manifest unfairness of permitting a state to impose heavier taxes on out-of-state interests than it is willing to place on its own constituents, the purpose of extracting greater revenues from nonresident companies cannot be deemed legitimate.[26]

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> the electors and their representatives. . . . [T]here is not [however] that intimate and inseparable relation between the electors of Great Britain and the inhabitants of the colonies, which must inevitably involve both in the same taxation. On the contrary, not a single actual elector in England might be immediately affected by a taxation in America. . . . Even acts oppressive and injurious to an extreme degree, might become popular in England, from the promise or expectation that the very measures which depressed the colonies, would give ease to the inhabitants of Great Britain.

D. Dulaney, "Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising a Revenue by Act of Parliament" (quoted in C. Becker, *The Declaration of Independence* at 87-89 (1958)).

[26] This rule is further supported by the settled principle, applicable under the Due Process Clause, that "a State may not tax value earned outside its borders." *ASARCO, Inc.* v. *Idaho State Tax Commission*, 458 U.S. 307, 315 (1982). It would make little sense to prohibit a state from taxing the premiums a foreign insurance company collects in other states, *see Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77, 80-81 (1938); *cf. Equitable Life Assurance Society of the United States* v. *Pennsylvania*, 238 U.S. 143 (1915), if the foreign company's in-state premiums could be taxed at three or four times the rate applied to the in-state premiums of domestic companies. The effect in many cases would be indistinguishable from permitting the state to tax the foreign company's out-of-state premiums.



### B. The Alleged Purpose of Encouraging Investment in the State Does Not Justify the Domestic Preference Tax

In apparent recognition of the futility of attempting to justify domestic preference taxation on the basis of its most obvious purpose—the raising of additional revenue from out-of-state companies—the lower courts and appellees have advanced several other purposes which are alleged to sustain the tax.[27] One of these purposes is "encouraging capital investment by foreign insurance companies in Alabama assets and governmental securities." J.S. App. 8a. This purpose apparently relates to the provision in the domestic preference tax statute which permits a foreign company to reduce its rate of tax by up to one percentage point by investing a portion (ranging from one to ten percent) of its total assets in specified investments in Alabama. Ala. Code § 27-4-4(b), (c) (1975).

This purpose fails to justify the discrimination in Alabama's tax for the simple reason that the so-called "investment incentive" provision in Alabama's domestic preference tax never permits a foreign company to elimi-

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[27] As a preliminary matter, it is not at all clear that these other purposes are even relevant to the inquiry. In *Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494 (1926), this Court stated without qualification that "tax laws made to apply after [a foreign insurance company] has been . . . received into the State are to be considered laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment." *Id.* at 510. It is thus at least arguable that a state may not assert non-revenue-related purposes in support of a tax that falls more heavily on foreign than domestic companies. *See also Smith* v. *Cahoon*, 283 U.S. 553, 566-67 (1931) ("In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the State's action.") The Court need not resolve this question, however, so long as it finds that the non-revenue-related purposes asserted by Alabama do not *justify* the state's inherently discriminatory scheme for taxing insurance companies.

rate the *discriminatory differential entirely*. Even if a foreign company invests *all* of its assets in Alabama, it still pays a substantially higher gross premiums tax than a domestic competitor doing the same type and volume of business. Thus, the ultimate discrimination against foreign companies is not related at all to the purpose to encourage investment by *out-of-state* insurers.[28]

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[28] The State has argued that the discriminatory differential remaining when a foreign company invests 10 percent or more of its assets in the state is justified because foreign companies, by definition, do not maintain their principal place of business in the state. *See* Motion to Dismiss or Affirm of the Commissioner at 19-19. This point is not well-taken, however. To begin with, the statute defining a domestic company requires not only that a company's principal place of business be in the state, but that its place of incorporation be in Alabama as well. Thus, regardless of the location of a company's principal place of business, it is "foreign" for Alabama's purposes if it is incorporated outside the state. *See* Ala. Code § 27-4-1 (1975).

More fundamentally, discrimination against companies based on the location of their principal place of business is analytically indistinguishable from discrimination against nonresident companies. "A corporation's residence, in legal contemplation, is the place where it maintains its office and transacts its business—its principal place of business." *Sneddon v. Farmers' State Bank of Mexia*, 228 S.W. 633, 636 (Tex. Civ. App. 1921). Congress, in defining the diversity jurisdiction of the federal courts, has recognized that the location of a corporation's principal place of business is as important as the place of incorporation in determining the extent to which it can be expected to suffer from local favoritism. *See* 28 U.S.C. § 1332(c) (1982). The principle of *Southern Railway* and *Wheeling Steel*, which forbids discrimination against companies based on *out-of-state* residence, should apply equally whether the definition of residence is stated in terms of place of incorporation or principal place of business. By either definition, domestic preference taxation would deny a foreign company equality in all but the one or two states where it can claim domiciliary status. This Court should thus adhere to the standard it has announced in the analogous context of the Privileges and Immunities Clause: "We can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable." *Chalker v. Birmingham & Northwestern Railway*, 249 U.S. 522, 527 (1919). *See also Department of Revenue*



Furthermore, an investment incentive provision such as Alabama's is no less discriminatory in its effects than a domestic preference tax that contains no such provision. Under Alabama's investment incentive provision, domestic companies pay the lowest rate of tax automatically, regardless of their investments in the state. Foreign companies, on the other hand, always pay the highest rate, unless they are able to invest a significant percentage of their total assets in Alabama.[29] No attempt is made in the Alabama statute to relate the required level of investment to the level of a company's business in the state. Nor is there any provision to pre-

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*v. Amway Corp.*, 358 So.2d 1345, 1348 (Fla. 1978) (invalidating under equal protection a law conferring a tax benefit on companies incorporated *or* having their principal place of business in the state).

[29] As a practical matter, it is often impossible for a foreign company to achieve the required investment percentage. The Court recognized this problem as an equal protection concern more than 60 years ago. In *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921), the State of North Carolina provided an 80 percent reduction in the amount of taxes due from any manufacturer of automobiles that invested at least three-*fourths* of its assets in state or municipal bonds or taxable property situated in the state. Three *out-of-state* corporations challenged the law on grounds that it violated the Equal Protection and Commerce Clauses. As this Court analyzed the situation, "[t]he condition can be satisfied by a resident manufacturer, his factory and the products in the first instance being within the State; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another State, some of its products only at a given time being within the state." *Id.* at 426. Accordingly, the Court held, "there is a real discrimination, and an offense against the Fourteenth Amendment." *Id.*

The State attempts to distinguish *Bethlehem Motors* by suggesting that it was a case where the state's purpose was held to be legitimate, but the statutory means were found to be unworkable. *See* Motion to Dismiss or Affirm of the Commissioner at 20-21. As the language quoted above indicates, however, the issue in *Bethlehem Motors* was not whether the investment incentive worked, but whether it discriminated against nonresidents. Once the Court determined that it did, it held the tax invalid notwithstanding the investment incentive purpose implicit in the statute.

vent an overlap between Alabama's investment requirements and similar provisions in other states.[29] Since the Court held in *Hanover Fire* that foreign companies are entitled to equal tax treatment even if they have very little permanent investment in the state, 272 U.S. at 508-09; *see Western & Southern*, 451 U.S. at 664, the Alabama investment incentive provision cannot save the Alabama statute from invalidity.

In sum, even if Alabama discriminated only against foreign companies that failed to invest a specified percentage of their total assets in the state, there would be a substantial question whether the law could survive equal protection scrutiny. Since Alabama in fact discriminates against all foreign companies, regardless of their investments in the state, it is pointless for the State to argue that encouraging investment is the purpose motivating the discriminatory aspect of this tax. Such a purpose, even if legitimate in itself, cannot justify the discrimination practiced here.

### C. The State's Other Asserted Purposes Have Already Been Rejected by This Court as Justifications for Domestic Preference Taxation

The other primary purpose asserted for the domestic preference tax—encouraging the formation of new insurance companies in Alabama—apparently refers to the state's interest in persuading insurance companies to in-

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[29] In fact, it is literally impossible for a nationwide insurer to comply with the investment requirements in all the domestic preference states where it may do business. Investment incentive provisions comparable to Alabama's exist in at least seven other states. A company seeking to pay the lowest rate of tax in all those states would be required to invest more than 350 percent of its total assets in those states. *See* Ga. Code Ann. § 33-3-5 (Cum. Supp. 1982); Idaho Code § 41-403 (Cum. Supp. 1982); La. Rev. Stat. Ann. § 22:1068 (West Supp. 1982); N.M. Stat. Ann. § 59-5-1(C) (1978 & Cum. Supp. 1982); Okla. Stat. Ann. tit. 36, § 625 (West 1976); W. Va. Code § 33-3-14f (Supp. 1982); Wyo. Stat. § 26-4-104(a) (1982).



corporate or innate in Alabama. While stated as an ultimate purpose by the courts below, this purpose is essentially only a step in achieving the larger set of purposes suggested by appellees, such as benefiting the local economy and bettering the welfare of the citizens of Alabama. The premise of this rationale for domestic preference taxation is that domestic insurance companies, on the whole, benefit the state in ways which foreign insurance companies do not.[30]

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[30] The State has also argued in this Court that the purpose of promoting domestic industry must be a legitimate justification for domestic preference taxation because that purpose has been held permissible in certain other contexts. *See* Motion to Dismiss or Affirm of the Commissioner at 7-15. The fallacy in this reasoning is pointed up by this Court's analysis in *Western & Southern*. "'No doubt,'" the Court observed, "'there are . . . subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.'" 451 U.S. at 668 (*quoting Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 493-94 (1927)). Under the State's view, this *sine qua non* distinction would be rendered meaningless, since the purpose of promoting domestic companies would always support treating foreign companies less favorably. This Court has never so held, however. Indeed, while the Court has sustained regulatory and police power measures that encourage local business activity, *see, e.g., Parker v. Brown*, 317 U.S. 341 (1943), as well as tax provisions that reward nonresidents for entering the state to do business, *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), it has never once upheld a domestic preference tax where the Equal Protection Clause was found to be applicable.

Similarly, state court decisions assertedly upholding the granting of a preference to local residents in government hiring and contracting, *see* Motion to Dismiss or Affirm of the Commissioner at 11-13, are inapplicable here. Those cases, even if correctly decided, *compare United Building & Construction Trades Council v. Camden*, 104 S. Ct. 1020 (1984), deal with the exercise by the state of its proprietary function, and not of its taxing power. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 & n.20 (1976); *see also*

In the lower courts, the State attempted to verify this assumption, which appears nowhere in the statute or its legislative history,[*] by elaborate economic and statistical studies. *See, e.g.*, J.A. at 46-137. As this Court has observed, however, "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Craig v. Boren*, 429 U.S. 190, 204 (1976). "[T]he principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups." *Id.* at 208-09.

The State's purported rationale here can hardly even be described as "loose-fitting." As was observed in a recent concurring opinion joined in by four Justices, "Permissible discriminations between persons must bear a rational relationship to their relevant characteristics." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) (emphasis in original). "While some imprecision is unavoidable in the process of legislative classification, the ideal of equal protection requires attention to individual merit, to individual need." *Id.* The place of residence of a corporation does not meet this test, because it has only the most tenuous relation to the actual contributions of a particular company to the state's economy and citizenry. The statute provides no reward to foreign companies, even if they maintain substantial offices in the state, employ large numbers of Alabama citizens, or provide economic benefits in the form of lower

*Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978) (dealing with a state's right to conserve a natural resource committed to its trusteeship).

[*] There is no formal legislative history of the Alabama statute challenged here. Apart from the express statutory goal of raising revenue, *see* J.S. App. 8a, the purposes urged here by appellees are all post hoc rationalizations. *See Craig v. Boren*, 429 U.S. 190, 199 n.7 (1976).



prices or better service. At the same time, domestic companies are benefited no matter how small their contribution to the state's welfare. A permanent tax disadvantage based solely on place of residence thus penalizes those foreign companies that have significantly benefited the state, while rewarding domestic companies whose relative contributions may be much smaller."

This classification is thus both underinclusive and overinclusive to an excessive degree. As with the duration-of-residence scheme invalidated in *Zobel v. Williams*, it can fairly be said here that "the relationship between residence and contribution to the State [is] so vague and insupportable, that it amounts to little more than a restatement of the criterion for discrimination that it purports to justify." *Id.* at 71 (Brennan, J., concurring). Here, as in *Zobel*, "it is difficult to escape from the recognition that underlying [this] scheme of classification . . . [is] the unstated premise that 'some citizens are more equal than others.'" *Id.*

At the same time, the implications of the purposes asserted by appellees are very far-reaching. None of

[*] In fact, the economic impact of a domestic preference tax can be analogized to that of a protective tariff. By raising the cost of doing business for out-of-state companies, the domestic preference tax shelters less efficient domestic insurers from the rigors of the marketplace and deprives consumers in the state of the benefits of competition. The National Association of Insurance Commissioners (NAIC) has criticized domestic preference taxes as being anachronistic and unfair. Task Force Report, Statement of Policy on Insurance Premium Taxation, 1 Proc. Nat'l Ass'n of Ins. Comm'rs 70 (1971). "While such discrimination may have been justified when insurance was an 'infant industry' in some parts of the country," the NAIC's Policy Statement comments, "it is an anachronism today. It distorts competition by subsidizing some competitors, allocates tax burdens unfairly among policyholders, ignores the national nature of much of the contemporary insurance economy, and is likely to impel major insurers to make corporate or marketing changes which will enable them to escape discrimination but which are not in the interest of a healthy insurance business functioning efficiently in the public interest." *Id.* at 70.

these purposes is limited to supporting the precise degree of discrimination practiced by Alabama. If promoting domestic insurance companies justifies the discrimination of three or four to one contained in this statute, it could as easily justify discrimination of ten or twenty to one. In contrast to the retaliatory tax situation, where the taxing state reciprocates precisely the tax treatment that its companies receive in the other state, *see Western & Southern*, 451 U.S. at 651, no attempt is made in the domestic preference tax law to relate the degree of discrimination to the supposedly legitimate purposes said to underlie the law. *Cf. G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 420 (1982) (Stevens, J., dissenting). Indeed, if these purposes are deemed legitimate as justifications for this discrimination, it is difficult to see how a state could ever be prevented from imposing more onerous burdens on foreign corporations than on domestic ones, since a presumed preferability of domestic companies would support any measure that disfavored nonresident competitors. Yet this Court has consistently held that "there are . . . subjects as to which such a course is not admissible." *Power Manufacturing Co. v. Saunders*, 274 U.S. at 494 (quoted in *Western & Southern*, 451 U.S. at 668). The purposes asserted here simply sweep too broadly.

Perhaps the most telling indication of the inadequacy of these purposes as a justification for discrimination, however, is this Court's decision in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965). In that case, the State of Ohio argued strenuously that its discriminatory tax on foreign insurance companies was valid under the rational basis test. "It is certainly not unreasonable to conceive," the state's brief contended, "that the Ohio legislature intended, by its substitution of the franchise tax for the personal property tax with respect to domestic insurance companies . . . to encourage the location of insurance companies in Ohio.' Brief of Appellee at 9, *Reserve Life Insurance Co. v. Bowers*, No. 96 (October Term, 1964) (reprinted at J.S. App. 12a, 15a). "Certainly, it is not unreasonable to conceive that the legislature was cognizant of the fact that all or a large part of the premiums collected by a foreign insurance company may be withdrawn from the state, whereas the same would not ordinarily be expected with domestics," the Ohio brief continued. "Further, all or a large part of the real estate of a domestic insurance company may reasonably be expected to be in Ohio, whereas the real estate of a foreign insurance company may reasonably be expected to be elsewhere." *Id.*, J.S. App. 15a-16a.



Far from accepting these arguments as adequate to support Ohio's tax, this Court reversed *per curiam* the decision of the Ohio Court of Appeals upholding the tax against equal protection challenge. On that basis alone, it is clear that a tax discriminating against foreign insurance companies as a class cannot be justified by a purpose to encourage the location of insurance companies in the state, even if the state asserts that it expects such companies to benefit the state's economy.

The State, apparently recognizing the pivotal significance of *Reserve Life* to the issue presented here, has made a vigorous effort to distinguish or minimize the holding in that case. *See* Motion to Dismiss or Affirm of the Commissioner at 14-16. *See also* pages 19-20, *supra*. Contrary to the State's contention, however, appellants have not, in construing *Reserve Life*, "[s]eiz[ed] upon [a] small portion of Ohio's brief, which was not mentioned in Ohio's introduction or conclusion as a significant argument." Motion to Dismiss or Affirm of the Commissioner at 14-15. To the contrary, Ohio not only advanced this point in the Argument section of its brief in *Reserve Life*, but also highlighted it in the Summary of Argument, asserting there that the personal property tax was "in favor of domestic companies but entirely within the bounds of preference permitted by the Four-

fourth Amendment for the purpose of serving the public interest. The basis upon which it is conceived is clearly rational." *See* J.S. App. 15a. Moreover, Ohio's brief went on to discuss at length the very precedents relied upon by the State in its Motion to Dismiss or Affirm in this case. *Compare id.* at 16a-17a with Motion to Dismiss or Affirm of the Commissioner at 7-8 (both citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937), and *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 529 (1959)).[26]

It is thus manifest that, in holding the Ohio statute invalid, the Court must have considered, and rejected, the argument that the statute was justified by the State's purpose "to encourage the location of insurance companies in Ohio." J.S. App. 15a. The State of Alabama has contended otherwise, suggesting in its Motion to Dismiss or Affirm that the "reversal could have been on any number of grounds." Motion to Dismiss or Affirm of the Commissioner at 13. However, it is fundamental that in order to reverse the decision below, the Court necessarily had to reject each and every ground asserted by Ohio on which the decision might have been sustained. *See Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979); *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *Standridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

[26] Lest there be any question whether Ohio abandoned these contentions at oral argument of the *Bowers Life* case, we have lodged with the Clerk a transcript of that argument obtained from the tape recording preserved in the National Archives. The transcript reveals that among the principal points advanced by the attorney for Ohio was the assertion that the discriminatory tax in that case could be sustained under the rational basis test of equal protection review. The oral argument thus was fully consistent with the brief filed on Ohio's behalf. For the convenience of the Court, the relevant portions of the transcript are reprinted in the Appendix to this Brief at 12a to 16a. In addition, copies of the full transcript are being furnished to counsel for all parties.



In short, there can be no serious contention that the purposes asserted here by the State of Alabama are being put before this Court for the first time. These very purposes have been previously advanced as justifications for domestic preference taxation and found wanting.[28] The Alabama domestic preference tax statute therefore lacks a legitimate state purpose and should be held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

[28] Traditionally, it has been this Court's practice not to reconsider its prior decisions where the only arguments advanced consist of "reasons originally offered against the decision in . . . analogous cases." *Seibert v. United States ex rel. Hawkman*, 129 U.S. 192, 198 (1889); *see also Wright v. Sill*, 67 U.S. (2 Black) 544 (1862). As the Court stated more recently in its unanimous decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980):

> *Stare decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law. In this case, the reasons petitioner asserts for overruling [*Bogan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949)] are the same factors which we concluded in [*Hanna v. Plumer*, 380 U.S. 460 (1965)] did not undermine the validity of *Bogan*. A litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence.

Here, appellees are asking this Court to overrule not two, but at least seven prior decisions on this issue, not to mention a long line of decisions from other state courts. Because the arguments advanced by appellees to date are no more than restatements of assertions already rejected by this Court on previous occasions, the doctrine of *stare decisis* should apply here with special force.

## CONCLUSION

The judgment of the Alabama Supreme Court, which upheld the constitutionality of the challenged statute, should be reversed, and the case remanded for the determination of appropriate refunds.

Respectfully submitted,

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June 20, 1984

# APPENDIX

# APPENDIX

## LIST OF PARTIES

Appellants:

Metropolitan Life Insurance Company
The Prudential Insurance Company of America
The Prudential Property and
Casualty Insurance Company
The Equitable Life Assurance Society
of the United States
New York Life Insurance Company
The Mutual Life Insurance Company of New York
John Hancock Mutual Life Insurance Company
The Paul Revere Life Insurance Company
The Paul Revere Variable Annuity
Insurance Company
State Mutual Life Assurance Company of America
Massachusetts Bay Insurance Company
Hanover Insurance Company
The Travelers Insurance Company
The Travelers Indemnity Company
The Phoenix Insurance Company
The Charter Oak Fire Insurance Company
The Travelers Indemnity Company of America
The Travelers Indemnity Company of Rhode Island
Industrial Indemnity Company
International Insurance Company
United States Fire Insurance Company
The North River Insurance Company
Hartford Fire Insurance Company
Hartford Accident and Indemnity Company
Twin City Fire Insurance Company
Hartford Life and Accident Insurance Company
Hartford Casualty Insurance Company
Hartford Life Insurance Company
Hartford Variable Annuity Life Insurance Company
Connecticut Mutual Life Insurance Company
Transamerica Occidental Life Insurance Company

Massachusetts Mutual Life Insurance Company
Aetna Life Insurance Company
The Aetna Casualty and Surety Company
Aetna Life Insurance and Annuity Company
The Automobile Insurance Company of
Hartford, Connecticut
The Standard Fire Insurance Company

Appellees:

W.G. Ward, Jr. as Commissioner of Insurance of the Department of Insurance of the State of Alabama

American Educators Life Insurance Company
Booker T. Washington Life Insurance Company
Federated Guaranty Life Insurance Company
Liberty National Life Insurance Company
Southern United Life Insurance Company



## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Ala. Code § 27-4-1 (1975):

§ 27-4-1. Definitions.

For the purposes of this chapter, unless otherwise stated, the following terms shall have the meanings respectively ascribed to them by this section.

(1) INSURER. Such term shall include every insurer as defined in section 27-1-2 and shall include nonprofit corporations organized pursuant to the provisions of section 10-4-100 et seq. or any other insurance company or association or society charging a premium for contracts entered into by such companies, associations or societies; provided, however, that the exemptions granted in chapter 33 of this title are applicable hereto.

(2) FOREIGN INSURER. Such term shall include any insurance company organized under the laws of any country or of any state of the United States other than the state of Alabama and shall also include insurance companies organized under the laws of Alabama which maintain their principal office or chief place of business outside the state of Alabama.

(3) DOMESTIC INSURER. Such term shall include any insurance company organized under the laws of

the state of Alabama which maintains its principal office and chief place of business in the state of Alabama.

(4) PREMIUMS. Such term shall include all amounts received in cash or otherwise on risks in this state as consideration for insurance contracts, less:

a. Insurance premiums returned;

b. Reinsurance premiums from insurance companies authorized to do business in Alabama and subject to the premium tax provided for in this chapter; and

c. Dividends paid, applied or left with the company to accumulate at interest.

With respect to title insurers, the term "premium" shall not include charges for abstracting, record searching, certificates as to the record title, escrow and closing services and other related services which may be offered or furnished or the costs and expenses of examinations of title.

(5) ANNUITY CONSIDERATIONS. All sums received as consideration for annuity contracts. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 812; Acts 1955, 2nd Ex. Sess., No. 77, p. 193, § 1; Acts 1969, Ex. Sess., No. 28, p. 74, § 1; Acts 1971, No. 407, p. 707, § 77; Acts 1971, No. 2106, p. 3375, § 1.)

Ala. Code § 27-4-4 (1975):

§ 27-4-4. Annual tax—Foreign insurers.

(a) Every foreign insurer, except foreign life insurers, shall pay an annual premium tax amounting to four percent of the premiums received by such foreign insurer for business done in this state except as to wet marine and transportation insurance as defined in section 27-5-8, whether the same are actually received by said insurer in this state or elsewhere, during the year ending December 31, preceding. Every foreign life insurer shall pay an annual premium tax amounting to one percent of annuity considerations and an annual premium tax of three percent of any other premiums received by such foreign life insurer for business done in this state, whether the same are actually received by said insurer in this state or elsewhere, during the year ending December 31, preceding. The rate of tax on premiums shall be subject to reduction as provided in this section. Any foreign insurer beginning business in the state of Alabama after January 1, of any calendar year shall, on or before March 1, of the year succeeding the year of its entry, remit with its statement to the commissioner the taxes as required by this chapter on business written in Alabama for the preceding calendar year or fraction thereof in which it began business as a tax for such first year or fractional year; provided, that after any such insurer has been operating in this state for one complete calendar year, it shall compute its business done in this state during said year, and upon this basis, it shall pay its taxes for that and the succeeding year. Each succeeding year the tax shall be based and paid upon business done in Alabama for the preceding calendar year, it being the intent and meaning of this section that such insurers shall pay their premium taxes on March 1, for such current year; except, that the premium taxes for the first and second year shall be paid in the manner specifically provided in this section.



The premium taxes collected in this section shall be deposited in the state treasury and credited in accordance with the following tabulation:

(1) To the credit of the state general fund, from which the legislature may appropriate funds for old age assistance purposes:

a. One hundred percent of premium tax on foreign life insurers;

b. Sixty-two and one-half percent of premium tax on all foreign property insurers; and

c. Seventy-five percent of premium tax on all other foreign insurers; and

(2) To the credit of the Alabama special educational trust fund:

a. Thirty-seven and one-half percent of premium tax on foreign property insurers; and

b. Twenty-five percent of premium tax on all other foreign insurers.

(b) If the annual statement or other report required to be made by such foreign insurer to the Alabama department of insurance, whose premiums are taxed under this chapter, for the preceding calendar year shows such insurer to have invested at the close of said year in Alabama investments, as defined in this section, the requisite percentages of its total admitted assets, the rate of premium tax hereby levied on premiums shall be that shown in the following schedules:

| Percentage of Insurer's Admitted Assets Invested in Alabama Investments | Applicable Rate of Premium Tax for Foreign Life Insurers | Applicable Rate of Premium Tax for All Other Foreign Insurers |
|---|---|---|
| Less than 1% | 3.0% | 4.0% |
| 1% and above but less than 2% | 2.9% | 3.9% |
| 2% and above but less than 3% | 2.8% | 3.8% |
| 3% and above but less than 4% | 2.7% | 3.7% |
| 4% and above but less than 5% | 2.6% | 3.6% |
| 5% and above but less than 6% | 2.5% | 3.5% |
| 6% and above but less than 7% | 2.4% | 3.4% |
| 7% and above but less than 8% | 2.3% | 3.3% |
| 8% and above but less than 9% | 2.2% | 3.2% |
| 9% and above but less than 10% | 2.1% | 3.1% |
| 10% and above | 2.0% | 3.0% |

(c) Alabama investments, as used in this section, shall mean any of the following investments:



(1) Real estate in this state;

(2) Bonds or interest-bearing warrants or other evidences of indebtedness of the state of Alabama or of any county, city, town, school district, state educational institution, municipality or other subdivision of the state, or of any duly authorized agency, board or authority of the state of Alabama or of any political subdivision thereof whether such agency, board or authority now exists or is hereafter created;

(3) Stocks, bonds or other evidences of indebtedness of any housing or redevelopment authority organized under the Housing Authorities Law or Redevelopment Law of the state of Alabama, as from time to time established and amended;

(4) Notes or bonds secured by mortgages or other liens on real estate or leasehold interests in real estate in the state of Alabama;

(5) Stocks, bonds, debentures, notes or other evidence of indebtedness of any corporation organized under the laws of the state of Alabama;

(6) Notes, debentures or other evidences of any indebtedness of any business operated as a sole proprietorship, partnership or other legal entity having its principal office and place of business in the state of Alabama;

(7) Notes, bonds or other evidences of indebtedness secured by mortgage or other lien upon real estate situated in the state of Alabama and insured or guaranteed, in whole or in part, by the United States or any agency or instrumentality thereof, together with any bonds, debentures or other evidences of indebtedness of the United States or any agency or instrumentality thereof received and retained in whole or partial settlement of any such insurance or guaranty;

(8) Collateral loans to Alabama residents or to others where at least one half of the value of the collateral so pledged constitutes an Alabama investment as defined in this section;

(9) Cash deposits in regularly established national or state banks in this state on the basis of the average monthly deposits throughout the calendar year;

(10) Loans secured by policies on the lives of residents of the state of Alabama;

(11) Share or share accounts of building and loan associations organized under the laws of the state of Alabama or in the share or share accounts of federal savings and loan associations having their principal office in the state of Alabama;

(12) Stocks, bonds, notes, debentures or other evidence of indebtedness of any corporation organized under the laws of any other state of the United States, to the extent that the assets of such corporation located in the state of Alabama bear to the total assets of the corporation issuing such stocks, bonds, notes or other evidences of indebtedness;

(13) Stocks, bonds, notes or other evidences of indebtedness issued by railroad companies, public carriers or transportation companies, to the extent that its trackage or mileage in Alabama bears to the total trackage or mileage of such railroad, public carrier or other transportation company;

(14) That percentage of such insurer's investments in stocks, bonds, notes or other evidences of indebtedness of any telegraph, telephone, electric power company or other public utility to the extent that the revenue of any such company from Alabama bears to the total of such telegraph, telephone, electric power company or other public utility; and



(15) That percentage of the insurer's investments held as of December 31, in direct obligations of the United States of America as the total premiums received by the company for direct insurance of subjects located, resident or to be performed in Alabama relate to the total premiums received by the insurer.

(d) Any such tax so determined shall be subject to credit and deduction of the full amount of:

(1) All ad valorem taxes paid by the insurer for the tax year next preceding the filing of the return required by this section upon any real estate and the improvements thereon in the state of Alabama owned and at least 50 percent occupied by the insurer for the full period of such tax year;

(2) All license fees and taxes paid to any county in this state during the year preceding the filing of the return required by this section for the privilege of engaging in the business of insurance within said county;

(3) All franchise taxes paid by the insurer under the provisions of sections 40-14-40 or 40-14-41 for the tax year preceding the filing of the return required by this section; and

(4) All expense of examination of the insurer by the commissioner. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 816; Acts 1955, 2nd Ex. Sess., No. 77, p. 193, § 3; Acts 1969, Ex. Sess., No. 28, p. 74, § 2; Acts 1971, No. 407, p. 707, § 79; Acts 1971, No. 2106, p. 3375, § 2.)

Ala. Code. § 27-4-5 (1975):

§ 27-4-5. Same—Domestic insurers.

(a) Every domestic life insurer shall pay to the commissioner on or before March 1, 1970, and annually thereafter, a premium tax equal to one percent of the premi-

ums and annuity considerations received by such insurer for business done in this state during the preceding calendar year ending December 31, whether the same are actually received by said insurer in this state or elsewhere. Every other domestic insurer and every nonprofit corporation organized pursuant to the provisions of section 10-4-100 et seq. shall pay to the commissioner on or before March 1, 1970, and annually thereafter, a premium tax equal to one percent of the premiums received by such insurer for business done in this state during the preceding calendar year ending December 31, whether the same are actually received by said company in this state or elsewhere. Any domestic insurer beginning business after January 1, of any calendar year, on or before March 1, of the year following the year beginning business, shall remit with its statement to the commissioner the taxes as required by this section on business written in Alabama for the preceding calendar year or fraction thereof in which it began business as a tax for such first year or fractional year; provided, that after any domestic insurance company has been operating in this state for one complete calendar year, it shall compute its business done in this state during said year, and upon this basis, it shall pay its taxes for that and the succeeding year. Each succeeding year the tax shall be based and paid on business done in Alabama for the preceding calendar year as provided in this section, it being the meaning and intent of this section that domestic insurers shall pay their premium taxes on March 1, for such current year; except that premium taxes for the first and second year shall be paid in the manner specifically provided in this section.

(b) Any such tax so determined shall be subject to credit and deduction of the full amount of:

(1) All ad valorem taxes paid by the insurer for the tax year preceding the filing of the return required by this section upon any building and real estate in the state of Alabama owned and occupied,



in whole or in part, by the insurer for the full period of such tax year as its principal office in the state of Alabama;

(2) All ad valorem taxes paid by the insurer for the tax year preceding the filing of the return required by this section upon all other real estate and improvements thereon in this state owned and at least 50 percent occupied by the insurer for the full period of such tax year;

(3) All license fees and taxes paid to any county in this state during the year preceding the filing of the return required by this section for the privilege of engaging in the business of insurance within said county;

(4) All expenses of examination of the insurer by the commissioner;

(5) All license or privilege taxes on lists of securities paid by the insurer under the provisions of section 40-24-8 during the tax year preceding the filing of the return required by this section; and

(6) All franchise taxes paid by the insurer under the provisions of section 40-14-40 for the tax year preceding the filing of the return required by this section.

(c) The premium taxes collected under this section shall be deposited in the state treasury and credited as follows:

(1) To the credit of the state general fund:

a. Fifty percent of premium tax on domestic life insurers;

b. No part of premium tax on nonprofit corporations organized pursuant to the provisions of section 10-4-100 et seq.; and

c. Twenty-five percent of premium tax on all other domestic insurers; and

(2) To the credit of the Alabama special educational trust fund:

a. Fifty percent of premium tax on domestic life insurers;

b. One hundred percent of premium tax on nonprofit corporations organized pursuant to the provisions of section 10-4-100 et seq.; and

c. Seventy-five percent of premium tax on all other domestic insurers.

(d) Every domestic insurer, anything in this chapter to the contrary notwithstanding, shall be exempt from and not required to pay any premium tax for or on account of any premiums or annuity considerations for hospital, medical, surgical or other health care benefits supplementary to Medicare and Medicaid received by it for or on account of business done in this state, whether the same are actually received in this state or elsewhere. (Acts 1935, No. 194, p. 206; Code 1940, T. 51, § 819; Acts 1945, No. 156, p. 196; Acts 1955, 2nd Ex. Sess., No. 77, p. 193, § 4; Acts 1969, Ex. Sess., No. 28, p. 74, §§ 3, 3½; Acts 1971, No. 407, p. 707, § 80; Acts 1971, No. 2106, p. 3375, §§ 3, 3½.)

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## EXCERPTS FROM THE ORAL ARGUMENT IN RESERVE LIFE INSURANCE CO. v. BOWERS *

• • • •

[16] ORAL ARGUMENT OF
EDGAR L. LINDLEY, ESQ.,
ON BEHALF OF APPELLEE

MR. LINDLEY: Mr. Chief Justice, Associate Justices:

I think the first thing that we should do is [17] to place this case in the proper perspective by pointing out that it is true that the real estate of both domestic and foreign insurance companies in Ohio is taxed in the same manner, and this is pursuant to an Ohio constitutional provision which requires all real estate to be taxed by uniform rules. It has nothing to do with any belief of the legislature that the real estate tax is tied in in any way with the franchise tax or the personal property tax insofar as these provisions are concerned. Also, it is true that the intangibles of insurance companies, both domestic and foreign, are exempted from taxation in the State of Ohio.

The franchise tax on insurance companies in Ohio, both foreign and domestic, is upon the same base. Under certain conditions the rate of franchise tax on domestics is 1.67 percent, and the rate on foreigns is 2.5 percent. The Appellant has indicated that this is a 50 percent discrepancy. I think it is just as logical to point out that this is a difference in rate of slightly less than 1 percent.

Using the Appellant's line of argument, the discrepancy in the case of Prudential Insurance Company v. Benjamin, which was mentioned—that's a North Carolina case—must have been an infinite discrepancy because there, as I recall that case, the domestics were [18]

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* *See* discussion at page 36 & n.28 *supra*. Page numbers from the transcript, which has been lodged with the Clerk of the Court, are indicated in brackets.

taxed at 0 percent and foreigns at 3 percent, and a discrepancy on a ratio basis from 0 to 3 becomes infinite.

QUESTION: Would you speak a little louder, please, Mr. Lindley?

MR. LINDLEY: Yes, sir.

QUESTION: But it's a large enough difference for Ohio to be interested in it, I gather?

MR. LINDLEY: Yes, it is, certainly just as in the case of the Lincoln National Insurance Company in Oklahoma the 2 percent margin was large enough for that state to be interested.

Now, Section 5725.25 of the Ohio Revised Code does provide that the franchise tax levied on domestic insurance companies shall be in lieu of all other taxes. And Section 5711.01 of the Ohio Revised Code, which levies the personal property tax, does provide by the definition of "taxpayer" that domestic insurance companies shall be excluded. These are companion sections.

The mere fact that you have an in lieu of provision in Section 5725.25 does not automatically mean that we must be able to find some specific substitute for that tax in some other provision. The legislature of the State of Ohio has attempted and has seen fit to [19] provide a tax discrepancy.

Now, we may point out, I think, that we are not here concerned with a question of commerce or equality in commerce, such as the Appellant mentions at page 18 of his brief. I think this Court has recognized and Congress has recognized that in the area of insurance companies, the states have a vital concern in the taxation and regulation of insurance companies.

I submit that as we understand the rule, it is not every discrepancy, it is not every distinction that has been denied under the Equal Protection Clause of the Constitution. It is our understanding that those distinctions which have a rational basis may be approved, and this



Court has held that legislation will be sustained where there are conceivable rational bases for the legislative act.

Now, I think it is certainly conceivable and rational to assume that the legislature of the State of Ohio had a desire to foster the development and creation of insurance companies within the state. These are desirable types of businesses. It is also, I think, reasonable to assume that the legislature of the State of Ohio knew or believed that domestic insurance companies would own more real estate in Ohio than foreign insurance companies. After all, most domestic [20] insurance companies have their home offices in the states in which they are domestic companies.

In this sense, then, even though the franchise tax rate is different, and even though the domestic insurance companies are taxed under the franchise tax law and in lieu of personal property tax, the domestic companies may pay in relation to their total business an amount comparable with the amount paid in taxes by foreign insurance companies.

• • • •

[28] MR. LINDLEY: I think essentially the admission of a foreign corporation, Your Honor, is a matter of contract, providing the contract does not go so far as to deprive the foreign corporation of their [29] fundamental federal constitutional rights.

QUESTION: Well, that's the question here.

MR. LINDLEY: That's right. And we submit that under the previous rulings of this Court, the distinction in this case is not so great as to be said not to have a reasonable and rational basis, and that the legislature of the State of Ohio may have had a perfectly valid interest in protecting and advancing the welfare of the people of the State of Ohio in seeking to encourage the location and development of insurance companies in the State of Ohio.

QUESTION: What you're saying is that as far as corporations are concerned, when they go to get into a state they make a contract, in a way, and that the state can require them to make a promise that they will pay more taxes than the others, whatever the state's motive, and you're saying that the Constitution doesn't prevent that.

MR. LINDLEY: This was exactly the case in the Lincoln Insurance Company case in Oklahoma. The company had agreed to pay all the taxes which the state levied on a year-to-year basis as a condition to the annual renewal of their certificate, and the state raised—the State of Oklahoma raised the tax from 2 percent to 4 percent, and they contested it, and it was upheld.

[30] QUESTION: You'd agree, I suppose, that if they tried to attach a condition, which this Court has held couldn't be done, that they would not enter into the federal courts, although the federal law gives them the right to do so, they could not impose such a condition as that?

MR. LINDLEY: I think that's true. They could not go that far.

JUSTICE BLACK: But you say here that there is neither a federal constitutional provision nor a federal law which prevents a state, if it wishes, to tell a corporation, you can't come in here unless you agree, in the interest of our businesses, to pay a little bit more tax than they do. That's what you're saying in substance.

MR. LINDLEY: What I'm saying, Justice Black, is that it is not every distinction of degree that is unconstitutional. And what I'm suggesting is that in this case the difference is not great and the difference is compatible with the desire and public purpose interest of the legislature of the State of Ohio to encourage the location of insurance companies in the State of Ohio.

• • • •

# JOINT

# APPENDIX

Office - Supreme Court, U.S.
FILED
JUN 20 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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METROPOLITAN LIFE INSURANCE CO., *et al.*,
*Appellants,*

v.

W. G. WARD, JR., *et al.*,
*Appellees.*

---

**On Appeal from the Supreme Court of Alabama**

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## JOINT APPENDIX
**Volume I**
**(Pp. 1-352)**

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---

JURISDICTIONAL STATEMENT FILED FEBRUARY 1, 1984
PROBABLE JURISDICTION NOTED APRIL 16, 1984

BEST AVAILABLE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-1274

---

METROPOLITAN LIFE INSURANCE CO., *et al.*,
*Appellants,*

v.

W. G. WARD, JR., *et al.*,
*Appellees.*

---

**On Appeal from the Supreme Court of Alabama**

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## JOINT APPENDIX

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IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

No. 8-CV-81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Plaintiff,*

v.

HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant.*

---

DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 8/6/81 | Appeal/Complaint Filed and Issued Sheriff Montgomery County for Service on Charles Graddick |
| 8/6/81 | Affidavit Filed |
| 8/6/81 | Security for Costs Filed and Approved. |
| 8/7/81 | Served S&C on Dean Mulder for Charles Graddick |
| 8/14/81 | Acceptance of service by Dept. of Insurance |
| 8/31/81 | Answer of deft. filed |
| 9/3/81 | Order of Consolidation fld. |
| 9/15/81 | Letter filed listing Hon. Warren Lightfoot & Mabry Rogers as additional attorneys of record for Deft. Tharpe Forrester |
| 10/1/81 | Amendment to answer filed by deft. |
| 10/30/81 | Amendment to Ans. fld by deft. |

| DATE | PROCEEDINGS |
|---|---|
| 11/9/81 | First Interrogatories to Pltf. filed |
| 11/16/81 | Motion to Intervene fld by American Educators Life Ins. Co., Booker T. Washington Life Ins. Co., Federated Guaranty Life Ins. Co., Liberty National Life Ins. Co. and Southern United Life Ins. Co.<br>Ans. fld by Movant/Intervenors |
| 12/7/81 | Order fld extending discovery Cut-off date to Mar. 1, 1982 & Motion to Intervene granted |
| 1/4/82 | Plffs answers & objections to defts' first interr filed |
| 1/21/82 | Order fld Consolidating Cases CV-81-1198-Th, 81-1199-Th, 81-1308G, 81-1309-Th, 81-1310G, 81-1311G, 81-1348-P, 81-1349-P, 81-1350-T, 81-1351-Th, 81-1352-H, 81-1353-G, 81-1354-G, 81-1355-Th, With Case No. CV-81-994-Th. |
| 1/22/82 | Motion To Consolidate fld. by Deft., Cases CV-81-994-Th, 81-995-Th, 81-996-Th, 81-997-Th, 81-998-Th, 81-999-Th, 81-1000-Th, 81-1001-Th, 81-1002-Th, 81-1003-Th, 81-1004-Th, 81-1005-Th, 81-1198-Th, 81-1199-Th, 81-1308-Th, 81-1309-Th, 81-1310-Th, 81-1311-Th, 81-1348-Th, 81-1349-Th, 81-1350-Th, 81-1351-Th, 81-1352-Th, 81-1353-Th, 81-1354-Th, 81-1355-Th, 81-1673-Th, 81-1674-Th, 81-1675-Th, 81-1676-P, 81-1677-G, 81-1678-Th, 81-1679-H, & 81-1680-H |
| 2/2/82 | Judge's order shortening date of cut-off for discovery from 3-1-82 to 2-15-82 |
| 2/12/82 | Motion to Compel further Ans. to Interrog fld by Deft. |
| 2/16/82 | Pltf's First Set of Interrog. to Defts. fld. |
| 3/1/82 | Pltf's Motion to Quash fld |
| 3/8/82 | List of Legitimate State Purposes of Ala's Differential Premium Tax Statute & offer of Proof relating thereto fld. by Deft./Intervenor |



| DATE | PROCEEDINGS |
|---|---|
| 3/8/82 | List of Legitimate State Purposes of Ala's Differential Premium Tax Policy & offer of Proof relating thereto fld. by Deft. |
| 3/11/82 | Piff's motion to quash filed |
| 3/22/82 | Pltf's response to Deft's List of Alleged Legitimate State Purposes for Ala's Discriminatory Premium tax filed (see 994) |
| 3/22/82 | Response to Lists of Deft & Deft's/Intervenors containing alleged Legitimate State Purposes for Ala's Discriminatory Premium Tax fld |
| 3/22/82 | Order fld, (1) Motion to Compel under Advisement, (2) Act in question, not revelant in determining issues presented for review, (3) Status hearing set for March 23, 1982 at 12:00 Noon, & (4) Cases numbered CV-82-245, CV-82-246, CV-82-247, CV-82-248 & CV-82-249 are Consolidated with CV-81-994-Th. |
| 4/27/82 | Motion for Summary Jdgt. filed by pltff. |
| 4/30/82 | Motion for Summary Jdgt. filed by deft./Intervenors |
| 4/30/82 | Motion for Summary Jdgt. filed by deft. |
| 5/3/82 | Motion for Continuance filed; 5/3/82 Order filed |
| 5/5/82 | Deft./Intervenor's Brief fld 5/5/82—Order filed |
| 5/5/82 | Deft./Intervenor's Response to Pltf's Motion for Summary Judgment fld |
| 5/5/82 | Affidavit of William J. Howard filed |
| 5/5/82 | Brief for Deft. filed |
| 5/5/82 | Response to Pltf's Motion for Summary Judgment fld |
| 5/7/82 | Pltf's response to Deft's Motion for Summary Judgment fld |
| 5/7/82 | Pltf's response to Deft's response to Pltf's Motion for Summary Judgment and Pltf's amendment to Motion for Summary Judgment fld |

| DATE | PROCEEDINGS |
|---|---|
| 5/10/82 | Affidavit of Alfred Hoffander filed |
| 5/10/82 | Brief in Opposition to defendant & intervenors Motion for summary Jdgt filed by pltff. |
| 5/11/82 | Addendum to Brief in opposition to Defts' and Intervenors' Motion for Summary Judgment filed |
| 5/17/82 | It is Coruidered, Ordered, Adjudged and Decreed that final judgment is entered in favor of the defendant and intervenors, and against the plaintiff in each of the cases consolidated herein. Costs in each case are taxed against the plaintiff, for which let execution issue.<br><br>Done at Montgomery, Alabama, on this 17th day of May, 1982.<br><br>/s/ H. Randall Thomas, Judge<br><br>Min Bk 82, pp 355-361 |
| 6/16/82 | Motion to Amend Findings of fact fld by Pltf. |
| 6/16/82 | Motion for a New Trial or in the Alternative Motion to Amend or vacate the Judgment fld by Pltf. |
| 6/28/82 | Addendum to Motion for a New Trial or in the Alternative Motion to Amend or vacate the Judgment fld by Pltfs. |
| 7/6/82 | Order fld overruling Pltf's Motion for a New Trial or in the Alternative Motion to Amend or vacate the Judgment |
| 8/17/82 | Notice of appeal to the Court of Civil Appeals filed with $50 docket fee, security for costs and designation of record. Amended notice of appeal filed with security for costs and designation of record. Letter of transmittal of notice of appeal and amended notice of appeal mailed to Clerk, Court of Civil Appeals, with docket fee, copy of notice of appeal and copy of amended notice of appeal (copy to CR & Attys.) |



| DATE | PROCEEDINGS |
|---|---|
| 9/13/82 | Certificate of completion of clerk's record mailed to Clerk, Court of Civil Appeals, with copy of index (copy to CR & Attys.) CR due Oct. 12, 1982. Appeal cost $634.40. |
| 9/28/82 | This case, and all others consolidated therewith, is transferred to the Supreme Court. |
| 10/13/82 | Certificate of completion of record on appeal mailed to Clerk, Supreme Court (copy to Attys.) File with court December 15, 1982. |
| 10/18/82 | This case, and all others consolidated therewith, transferred back to Court of Civil Appeals |
| 12/8/82 | Supreme Court denied Motion of Appellee to have cases transferred to Supreme Court |
| 12/22/82 | Letter of transmittal of record on appeal mailed to Clerk, Court of Civil Appeals (copy to Attys.) Orig. record on appeal filed with Court of Civil Appeals. |
| 4/27/83 | Affirmed in part; reversed in part and remanded by Court of Civil Appeals (opinion) |
| 6/1/83 | Application for rehearing overruled. |

*[Docket entries in 23 consolidated cases omitted]*

IN THE COURT OF CIVIL APPEALS
OF ALABAMA

---

No. Civ. 3424

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation, *et al.*

v.

THARPE FORRESTER, as Commissioner
of Insurance of the Department of Insurance
of the State of Alabama

AMERICAN EDUCATORS LIFE INS. CO., *et al.*,
*Intervenors*

---

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 12/22/82 | Record Filed C/M R/M A/N C1/N (Appendix Filed) (Extra Copy of Record Filed) C/M R/M A/N |
| 11/17/82 | Oral Argument Requested by Appellant W/S & Appellee W/S |
| 2/1/83 | Oral Argument Set |
| 3/1/83 | Continued 9 AM |
| 9/7/82 | Appellees motion to transfer to S.C. Mar. 22, 1983 9 AM |
| 9/13/82 | Appellant's Response to Motion |
| 9/28/82 | Motion to Transfer to S.C. Granted |
| 10/12/82 | Transferred by S.C. |
| 11/9/82 | Appt motion to enlarge argument portion of brief |



| DATE | PROCEEDINGS |
|---|---|
| 11/10/82 | Appt motion granted re: enlargement of argument in brief |
| 12/14/82 | Appellees motion to extend argument portion of brief |
| 12/15/82 | Appellees motion granted |
| 12/15/82 | Motions of Atty Gen of State of Michigan, South Dakota and Wyoming to file Amicus Brief—Motions Granted—Briefs Filed |
| 1/14/83 | *Appts motion to extend length of reply brief to 41 pages |
| 1/18/83 | *Granted<br>Certificate of Judgment Transmitted |
| 2/8/83 | OA—continued to March |
| 3/22/83 | Argued and Submitted |
| 4/27/83 | Affirmed In Part: Reversed In Part and Remanded with Directions<br>Opinion Issued |
| 5/11/83 | Application for Rehearing filed |
| 6/1/83 | Application for Rehearing Overruled. No Opinion Written on Rehearing |
| 6/1/83 | Motion for substitution of parties |
| 6/1/83 | Cert SC |
| 6/8/83 | Cert SC |
| 6/14/83 | Cert SC |
| 9/23/83 | Certificate, Clerk, Supreme Court, Petition Denied Rehearing? |
| 11/10/83 | Motion Granted: Rules Suspended; Rehearing Granted; Writ of Certiorari Granted; Judgment of Civil Court Modified; Affirmed as Modified. |
| 12/8/83 | Cert US SC—Rd. Allen |

IN THE SUPREME COURT OF ALABAMA

No. 82-813

EX PARTE: HONORABLE W. G. WARD, JR., as Commissioner of Insurance of the Department of Insurance of the State of Alabama

DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 6/1/83 | 9cc Petition and Briefs Filed |
| 7/25/83 | Submitted for Preliminary Examination |
| 9/23/83 | Writ Denied—No Opinion—Certificate Issued |
| 9/23/83 | Concurrences Per Curiam—MA, FA, JO, EM, BE, AD Concur.<br>Writ Granted to & SH Recused. AL Not Sitting<br>Oral Argument Req. by<br>Oral Argument Set<br>Submitted<br>Opinion By<br>Concurrences<br>Judgment<br>Application for Rehearing Filed See Entry of 10/13/83 |
| 11/10/83 | Action on Rehearing See Entry Below |
| 12/2/83 | Certificate of Judgment Issued<br>Citation: ——— So. 2d ——— |
| 10/11/83 | Library Fee Transferred—$5.00 |
| 6/15/83 | Respondents, Metro and Prudential, granted to June 22, 1983 to file briefs in response to petition. See 82-851.wo |



| DATE | PROCEEDINGS |
|---|---|
| 7/5/83 | Motion for Substitution of Parties (W. G. Ward, Jr. for Tharpe Forrester, as Commissioner of Insurance). Granted 7-5/dn/wo |
| 10/13/83 | Joint request for suspension of rules & stipulation & motion of parties for a rehearing & entry of judgment.co Del to [illegible] 10-14-83 |
| 11/10/83 | Motion Granted; Rules Suspended; Rehearing Granted; Writ of Certiorari Granted; Judgment of the Court of Civil Appeals Modified; Affirmed as Modified. Per Curiam. Maddox, Faulkner, Jones, Embry, Beatty and Adams, JJ. concur; Torbert, CJ. and Shores, J., recused; Almon, J., not sitting. |
| 12/8/83 | 1cc Notice of appeal to the US Supreme Court. file |
| 1/6/84 | Rec'd notice of filing appeal w/ U. S. Supreme Court 2/1/84.co. |
| 4/19/84 | 1cc Order of U. S. Sup. Ct. noting probable jurisdiction in this case. co |

*[Docket entries in 2 consolidated cases omitted]*

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-944

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Appellant/Plaintiff*

v.

HONORABLE THARPE FORRESTER, as Commissioner
of Insurance of the Department of Insurance
of the State of Alabama,
*Appellee/Defendant*

[Filed Aug. 6, 1981]

---

**NOTICE OF APPEAL**

Comes now METROPOLITAN LIVE INSURANCE COMPANY, a New York corporation, and hereby gives notice of and takes an appeal to the Circuit Court of Montgomery County, Alabama, from the order of the Commissioner of Insurance of the State of Alabama rendered in this cause on the 8th day of July, 1981.

EXECUTED, this 5th day of August, 1981.

METROPOLITAN LIFE INSURANCE
COMPANY

By: /s/ Rufus M. King
RUFUS M. KING



The undersigned, jointly and severally, hereby acknowledge ourselves security for all costs as may be assessed against Appellant/Plaintiff in this proceeding.

CAPELL, HOWARD, KNABE &
COBBS, P.A.

By: /s/ Rufus M. King
RUFUS M. KING

/s/ Rufus M. King
RUFUS M. KING

Comes now the Clerk of the Circuit Court of Montgomery County, Alabama, and approves the foregoing bond for costs in this case.

/s/ Pauline C. Eubanks
Clerk
Circuit Court
Montgomery County, Alabama

*[Substantially identical notices of appeal in 88 consolidated cases omitted]*

*[Certificate of Service omitted in printing]*

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Appellant/Plaintiff,*

vs.

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Appellee/Defendant.*

[Filed Aug. 6, 1981]

---

**APPEAL/COMPLAINT**

Comes now METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation, as Appellant/Plaintiff in the above styled cause, and shows unto this Honorable Court as follows:

**GENERAL AVERMENTS**

1. Your Appellant/Plaintiff is a corporation duly organized and existing under the laws of the State of New York, and is now, and was at all times material to this proceeding, duly qualified and licensed under the laws of the State of Alabama to engage in the life insurance business in the State of Alabama.

2. Your Appellant/Plaintiff alleges that it is a foreign insurer under the provisions of Section 27-4-1(2), and Section 27-4-4, Code of Alabama, 1975.



3. The Appellee/Defendant, Honorable Tharpe Forrester, is on the date hereof and during all times material to this proceeding, the duly appointed and authorized Commissioner of Insurance of the State of Alabama, as defined in Section 27-1-2(4), Code of Alabama, 1975.

4. Appellant/Plaintiff has heretofore paid taxes for the years 1977, 1978, 1979, and 1980, under the provisions of the Code of Alabama, 1975, Section 27-4-4, the year and amount of taxes paid pursuant to Section 27-4-4 which are involved in this proceeding are as follows:

| Year | | Amount |
|---|---|---|
| 1977 | $1,235,892.74 | |
| | 2,261.15 | $1,238,153.89 |
| 1978 | | 1,367,744.24 |
| 1979 | | 1,443,394.19 |
| 1980 | | 1,382,989.74 |

5. Your Appellant/Plaintiff has heretofore filed Petitions for Refund for taxes paid pursuant to Section 27-4-4 as follows:

| Year | | Premium Taxes Paid |
|---|---|---|
| 1977 | $1,235,892.74 | |
| | 2,261.15 | $1,238,153.89 |
| 1978 | | 1,367,744.24 |
| 1979 | | 1,443,394.19 |
| 1980 | | 1,382,989.74 |
| Total | | $5,432,282.06 |

which Petitions were denied by the Appellee/Defendant on July 8, 1981.

6. If Appellant/Plaintiff had been a life insurance company organized and existing under the laws of the State of Alabama, and maintained its principal office and chief place of business in the State of Alabama, it would have been subject to a lesser tax burden, under the provisions of Section 27-4-5, Code of Alabama, since it would have been a domestic life insurer, under Section 27-4-5 and Section 27-4-1(3), Code of Alabama.

7. Appellant/Plaintiff alleges that Section 27-4-4 and the tax provided for therein are invalid and unconstitutional for one or more of the following reasons:

(a) The statute, including the tax provided for therein, seeks to impose on Appellant/Plaintiff a tax which is arbitrary, capricious, unfair, discriminatory and unequal as between members of the same class as taxpayer and as such is unlawful and unconstitutional.

(b) The statute, including the tax provided for therein, seeks to impose an unequal tax on Appellant/Plaintiff in contradiction and violation of Article XI, Section 217 of the Constitution of Alabama, 1901.

(c) The statute, including the tax provided for therein, seeks to impose a tax on Appellant/Plaintiff in contradiction and violation of Article I, Section 1, of the Constitution of Alabama, 1901, by imposing an unreasonable and discriminatory law upon Appellant/Plaintiff.

(d) The statute, including the tax provided for therein, seeks to impose a tax on Appellant/Plaintiff in contradiction and violation of Article I, Sections 6 and 13 of the Constitution of Alabama, 1901, in that it violates due process provisions thereof.

(e) The statute, including the tax provided for therein, seeks to impose a tax on Appellant/Plaintiff in contradiction and violation of Article I, Section 22, of the Constitution of Alabama, 1901, in that Section 27-4-5 imposes a premium tax upon domestic insurers of a lesser amount and, therefore, Section 27-4-4, when compared to Section 27-4-5, results in special privileges or immunities being granted by the Legislature in violation of said Section 22 of the Alabama Constitution of 1901.

(f) The statute, including the tax provided for therein, seeks to impose a tax on Appellant/Plaintiff in contradiction and violation of Article I, Section 35, of the Constitution of Alabama, 1901, in that it imposes an unequal and non-uniform tax upon foreign insurers.



(g) The statute, including the tax provided for therein, seeks to impose a tax on Appellant/Plaintiff in contradiction and violation of Section 232 of the Constitution of Alabama, 1901, in that the license or franchise tax imposed upon foreign corporations is not based upon the actual amount of capital employed in this State.

(h) The statute, including the tax provided for therein, seeks to impose a tax on Appellant/Plaintiff in contradiction and violation of the due process and equal protection clauses of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, in that it arbitrarily and without rational or reasonable basis places a greater tax burden on foreign insurers than is otherwise placed upon domestic insurers.

(i) The statute, including the tax provided for therein, seeks to impose a tax on Appellant/Plaintiff in contradiction and violation of Article IV, Section 2, of the Constitution of the United States of America, in that the privileges and immunities of your Appellant/Plaintiff are not equal to domestic insurers.

COUNT I

8. Appellant/Plaintiff realleges Paragraphs 1 through 7, as set forth hereinabove.

9. Appellant/Plaintiff does hereby appeal the denial by Appellee/Defendant of its Petition for Refund pursuant to the provisions of Section 27-2-32, and Section 27-4-11, Code of Alabama, 1975.

COUNT II

10. Appellant/Plaintiff realleges Paragraphs 1 through 7, as set forth hereinabove.

11. Appellant/Plaintiff alleges that it is entitled to a writ of certiorari, mandamus, or other appropriate remedy, directed to Appellee/Defendant to make refunds pur-

suant to the provisions of Section 27-2-32, and Section 27-4-11, Code of Alabama, 1975.

COUNT III

12. Appellant/Plaintiff realleges Paragraphs 1 through 7, as set forth hereinabove.

13. Appellant/Plaintiff alleges that a substantial controversy exists between Appellant/Plaintiff and Appellee/Defendant, and that Appellant/Plaintiff is entitled to a declaration of rights pursuant to the provisions of Section 6-6-223, Code of Alabama, 1975, declaring Section 27-4-4 to be unconstitutional and of no force and effect.

WHEREFORE, Appellant/Plaintiff prays that Appellee/Defendant, Honorable Tharpe Forrester, as Commissioner of Insurance of the State of Alabama, be made a party to this proceeding, and that process be served upon said Appellee/Defendant, and upon the Attorney General of the State of Alabama, pursuant to the provisions of Section 6-6-227, Code of Alabama, 1975, requiring such parties to respond, plead, answer or demur to this proceeding within the time and in the manner required by law, and that, upon a final hearing of this cause, this Honorable Court will enter an order:

A. To reverse, vacate or modify, as appropriate, the decision of the Commissioner of Insurance, made July 8, 1981, denying Appellant/Plaintiff's right to refund of premium taxes paid.

B. Issue the Court's writ of certiorari, mandamus or other appropriate order, directed to the Honorable Tharpe Forrester, Commissioner of Insurance, requiring said Commissioner of Insurance to issue an order granting a refund to Appellant/Plaintiff in the amount of $5,432,282.06 paid as premium taxes under Section 27-4-4 of the Code of Alabama, 1975, for the years 1977, 1978, 1979, and 1980.



C. Declaring that Section 27-4-4 of the Code of Alabama, 1975, is unconstitutional and, therefore, void and unenforceable.

Appellant/Plaintiff offers to do equity and prays for such other, further or different relief as it may be entitled to receive under the premises considered.

/s/ Rufus M. King
RUFUS M. KING
As Attorney for
Metropolitan Life Insurance
Company

Of Counsel:

CAPELL, HOWARD, KNABE & COBBS, P.A.
57 Adams Avenue
Post Office Box 2069
Montgomery, Alabama 36197
Telephone: (205) 262-1671

[Affidavit of Service omitted in printing]

The undersigned, jointly and severally, hereby acknowledge ourselves security for all costs as may be assessed against Appellant/Plaintiff in this proceeding.

CAPELL, HOWARD, KNABE & COBBS, P.A.

By: /s/ Rufus M. King
RUFUS M. KING

/s/ Rufus M. King
RUFUS M. KING

Comes now the Clerk of the Circuit Court of Montgomery County, Alabama, and approves the foregoing bond for costs in this case.

/s/ Pauline C. Eubanks
Clerk
Circuit Court
Montgomery County, Alabama

*[Substantially identical complaints in 38 consolidated cases omitted]*



IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV 81-994 Th.

---

METROPOLITAN LIFE INSURANCE COMPANY,
a New York Corporation,
*Plaintiff,*

v.

HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant.*

---

ANSWER

Defendant for answer to the alleged appeal/complaint says as follows:

FIRST DEFENSE

It fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. The allegations of paragraph 1 of the complaint are admitted.

2. The allegations of paragraph 2 of the complaint are admitted.

3. Defendant has served as Commissioner of Insurance for the State of Alabama since May, 1980. Except as herein expressly admitted, the allegations of paragraph 3 of the complaint are denied.

4. Defendant admits that plaintiff paid the amounts shown for the years reflected in paragraph 4 of the com-

plaint. Except as herein expressly admitted, the allegations of paragraph 4 of the complaint are denied.

5. Defendant admits that plaintiff requested on February 24, 1981, and June 22, 1981, refund of the amounts and for the years shown in paragraph 5 and that defendant denied these requests on July 8, 1981. Except as herein expressly admitted, the allegations of paragraph 5 are denied.

6. Defendant admits that if plaintiff were a life insurance company organized and existing under the laws of the State of Alabama and maintained its principal office and chief place of business in the State of Alabama, then plaintiff would be a domestic insurer under Section 27-4-1(3) and a domestic life insurer under Section 27-4-5, Code of Alabama 1975. Except as herein expressly admitted, the allegations of paragraph 6 are denied.

7. The allegations of paragraph 7 and of each subparagraph (a) through (i), inclusive, are denied.

8. Defendant adopts his answers to paragraphs 1 through 7, inclusive.

9. The allegations of paragraph 9 of the complaint are denied.

10. Defendant adopts his answers to paragraphs 1 through 7, inclusive.

11. The allegations of paragraph 11 are denied.

12. Defendant adopts his answers to paragraphs 1 through 7, inclusive.

13. The allegations of paragraph 13 are denied.

THIRD DEFENSE

Defendant pleads the general issue.



FOURTH DEFENSE

This action is barred by the statute of limitations.

FIFTH DEFENSE

Plaintiff is estopped to make the claims alleged in this action.

SIXTH DEFENSE

Plaintiff has waived the claims alleged in this action.

SEVENTH DEFENSE

Plaintiff's claims are barred by laches.

EIGHTH DEFENSE

Defendant is immune from the claims alleged in this action.

NINTH DEFENSE

Plaintiff's claims are barred by the McCarran-Ferguson Act.

TENTH DEFENSE

Plaintiff lacks standing to make these claims.

/s/ Phillip E. Stano

/s/ Warren B. Lightfoot

/s/ E. Mabry Rogers
Attorneys for Defendant

[Certificate of Service omitted in printing]

*[Substantially identical answers in 18 consolidated cases omitted]*

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-994-Th.

METROPOLITAN LIFE INSURANCE COMPANY,
a New York Corporation,
*Plaintiff,*

v.

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant.*

---

**AMENDMENT TO ANSWER**

The defendant amends paragraph 5 of his answer heretofore filed by (a) deleting the words "February 24, 1981, and" and (b) changing the words "these requests" to "this request."

/s/ Phillip E. Stano

/s/ Warren B. Lightfoot
Attorneys for Defendant

[Certificate of Service omitted in printing]

[*Substantially identical amendments to answers in consolidated cases omitted*]



IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York Corporation,
*Plaintiff,*

v.

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant.*

---

**AMENDMENT TO ANSWER**

The defendant amends paragraph 4 of his answer heretofore filed by substituting for the word "admits" the word "denies".

/s/ Phillip E. Stano

/s/ Warren B. Lightfoot
Attorneys for Defendant

[Certificate of Service omitted in printing]

[*Identical amendments to answers in consolidated cases omitted*]

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation,
*Plaintiff,*

vs.

HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation,
*Intervenors.*

[Filed Nov. 16, 1981]

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**[INTERVENORS'] ANSWER**

Come now Movant/Intervenors, American Educators Life Insurance Company, Booker T. Washington Life Insurance Company, Federated Guaranty Life Insurance Company, Liberty National Life Insurance Company, and Southern United Life Insurance Company, and for answer to the Complaint filed herein say as follows:

1. Admitted.

2. Admitted.



3. Movant/Intervenors do not have sufficient information to admit or deny the allegations of Paragraph 3.

4. Movant/Intervenors do not have sufficient information to admit or deny the allegations of Paragraph 4.

5. Movant/Intervenors do not have sufficient information to admit or deny the allegations of Paragraph 5.

6. Movant/Intervenors admit that if Plaintiff was a life insurance company organized and existing under the laws of the State of Alabama, and maintained its principal office and chief place of business in the State of Alabama, then the Plaintiff would be a domestic insurer under Section 27-4-1(3) and a domestic life insurer under Section 27-4-5, Code of Alabama, 1975. Except as herein expressly admitted, the allegations of Paragraph 6 are denied.

7. The allegations of Paragraph 7 and each subparagraph (a) through (i), inclusive, are denied.

8. Movant/Intervenors adopt their answers to Paragraphs 1 through 7, inclusive.

9. The allegations of Paragraph 9 of the Complaint are denied.

10. Movant/Intervenors adopt their answers to Paragraphs 1 through 7, inclusive.

11. The allegations of Paragraph 11 are denied.

12. Movant/Intervenors adopt their answers to Paragraphs 1 through 7, inclusive.

13. The allegations of Paragraph 13 are denied.

**FIRST DEFENSE**

The Complaint filed herein fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Movant/Intervenors plead the general issue.

THIRD DEFENSE

This action is barred by the statute of limitations.

FOURTH DEFENSE

Plaintiff is estopped to make the claims alleged in this action.

FIFTH DEFENSE

Plaintiff has waived the claims alleged in this action.

SIXTH DEFENSE

Plaintiff's claims are barred by the McCarran-Ferguson Act.

SEVENTH DEFENSE

Plaintiff lacks standing to make these claims.

/s/ Harry Cole
HARRY COLE

/s/ Robert W. Bradford, Jr.
ROBERT W. BRADFORD, JR.
Attorneys for
Movant/Intervenors

Of Counsel:

HILL, HILL, CARTER, FRANCO,
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Post Office Box 116
Montgomery, Alabama 36195
(205) 834-7600

[Certificate of Service omitted in printing]



IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-994-Th [*et al.*]

METROPOLITAN LIFE INSURANCE COMPANY,
a New York Corporation, [*et al.*],
*Plaintiffs,*

vs.

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, [*et al.*],
*Intervenors.*

[Filed Mar. 8, 1982]

---

**[DEFENDANT'S] LIST OF LEGITIMATE STATE PURPOSES OF ALABAMA'S DIFFERENTIAL PREMIUM TAX POLICY AND OFFER OF PROOF RELATING THERETO**

Now comes Defendant and in response to this Court's February 19, 1982 Order requiring a list of legitimate State purposes of Alabama's differential premium tax policy, presents to the Court the following legitimate State purposes:

1. To encourage the formation of new insurance companies domiciled within Alabama, thereby gaining the economic benefits that the added job opportunities, employment, and payrolls can provide to the

Alabama communities in which such headquarters facilities may be located.

2. To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on an equal footing with well-established, out-of-state companies. The existence of viable domestic insurance companies adds a new and important source of competition for large, nationally-known companies; having both foreign and domestic companies in vigorous competition with each other for customer patronage, makes the insurance marketplace more contestable and increases the likelihood that all insurance companies (both foreign and domestic) will have to provide more attractive rates and levels of service to the general public.

3. To extend the range of customer choice among alternative insurance companies. The existence of healthy, viable domestic insurance companies gives the general public a wider range of both companies and types of policies to choose from in selecting what kinds of insurance coverage and insurance service best suits their needs.

4. To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies.

5. To reduce the barriers to entry into the insurance industry.

6. To encourage more insurance to be sold in Alabama, with the result that more Alabama citizens gain access to the many benefits that adequate insurance protection provides.

7. To promote a greater level of average insurance coverage per family in Alabama.



8. To enhance the use of insurance by Alabama families.

9. To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, accidents, and other such calamities as may render them debilitating financial losses. To the extent that differential premium tax policies can be used to create a domestic insurance industry that, in turn, enhances competition in the property and casualty insurance industry in Alabama, then the more likely it is that Alabama families and Alabama businesses will be attracted to insure themselves adequately against insurable types of calamities. The benefits and protection that such coverage affords redounds to the benefit of the general public and lessens the burden that calamities might otherwise impose on state and local governments and thus upon Alabama taxpayers.

10. To promote greater use of insurance of all types in rural and sparsely populated sections of Alabama —market segments which usually are ignored by large, foreign companies but which may well be attractive to small, domestic companies if concentrating on such "vacant niches" can be made economically feasible.

11. To promote a higher rate of economic development in the state of Alabama. The provision of the Alabama law that allows the premium taxes of foreign insurance companies to be reduced .1% for each 1% of their admitted assets invested in Alabama is intended as an incentive for foreign companies to increase their Alabama investments above what they might otherwise elect to invest in Alabama. The objective of using premium tax incentives to attract added amounts to investment capital to Alabama is a particularly useful and potentially important eco-

nomic benefit, given Alabama's long-standing position as a low-income, relatively undeveloped state.

12. To promote the growth and development of a domestic insurance industry, thereby realizing the general economic and public benefit that derives from the fact that domestic insurance companies typically invest a far higher percentage of their admitted assets in Alabama than do foreign companies. Alabama's efforts to achieve economic parity with other, more economically-advanced states is materially enhanced by differential premium taxation because of the general practice of domestic insurance companies to direct significantly higher percentages of their investment capital to in-state projects. Domestic insurance companies are therefore a very important source of capital for financing projects that benefit the citizens of Alabama and that contribute to a faster rate of economic growth within the state.

13. To lessen the adverse impact which foreign insurance companies have on the economy of Alabama. Foreign insurance companies collect far more insurance premiums from Alabama policyholders than they reinvest in Alabama. By channeling the premiums collected in Alabama to investments and purposes outside of Alabama, the activities of foreign insurance companies have an adverse impact on economic growth within the State—much needed funds are being withdrawn from the State's economy at the very time when such funds are desparately needed to help boost economic activity within the State. In contrast, it is well known that domestic insurance companies, on average, reinvest a far higher proportion of their admitted assets in Alabama than do foreign companies. One of the purposes of differential premium taxation in Alabama is thus to help redress the adverse impact which foreign companies have on the State's economy as concerns the use of



the premium income they obtain in Alabama and their relative disinclination to invest in Alabama's underdeveloped economy. Achieving a higher degree of economic parity with the rest of the states in the United States has for many years been one of the State's foremost goals.

14. To raise revenues for the State of Alabama.

Defendant informs the Court that he anticipates that he will possess testimony by recognized experts which will fully support each of these legitimate State purposes. Defendant further informs the Court that this testimony should be ready for presentation to the Court in approximately eight (8) weeks. Defendant respectfully requests the opportunity to present and preserve this testimony for the record.

Respectfully submitted,

/s/ Phillip Edward Stano
PHILLIP EDWARD STANO

/s/ Warren B. Lightfoot
WARREN B. LIGHTFOOT

/s/ Mabry Rogers
MABRY ROGERS

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-91-994-Th [*et al.*]

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation, [*et al.*],
*Plaintiffs,*

vs.

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, [*et al.*],
*Intervenors.*

[Filed Mar. 8, 1992]

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**[INTERVENORS'] LIST OF LEGITIMATE STATE PURPOSES OF ALABAMA'S DIFFERENTIAL PREMIUM TAX STATUTE AND OFFER OF PROOF RELATING THERETO**

Come now Defendant/Intervenors and in response to this Court's February 19, 1992 Order requiring a list of legitimate State purposes of Alabama's differential premium tax statute, present to the Court the following legitimate State purposes:

1. Defendant/Intervenors adopt by reference as if specifically set forth herein the List of Legitimate State Purposes proffered by Defendant, Tharpe Forrester, in that pleading entitled "List of Legitimate State Purposes of Alabama's Differential Premium Tax Policy and Offer of Proof Relating Thereto" filed with this Court on March 6, 1992, attached hereto.

2. To encourage domestic insurance companies to keep their home offices in Alabama.

3. To promote the availability of insurance of all types in all areas of the State of Alabama.

4. To encourage investments by foreign insurance companies within the State of Alabama.

Defendant/Intervenors intend to present testimony by recognized experts which will fully support each of these legitimate State purposes. Defendant/Intervenors further state that this testimony should be ready for presentation to the Court in approximately eight (8) weeks. Defendant/Intervenors respectfully request the opportunity to present and preserve this testimony for the record.



Respectfully submitted,

/s/ Harry Cole
HARRY COLE

/s/ Robert W. Bradford, Jr.
ROBERT W. BRADFORD, JR.
Attorneys for
Defendant/Intervenors

Of Counsel:

HILL, HILL, CARTER, FRANCO,
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Post Office Box 116
Montgomery, Alabama 36195
(205) 834-7600

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-994-Th [*et al.*]

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation, [*et al.*],
*Plaintiffs,*

v.

HONORABLE THARPE FORRESTER, as *Commissioner of*
*Insurance of the Department of Insurance*
*of the State of Alabama,*
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, [*et al.*],
*Intervenors.*

[Filed Mar. 22, 1982]

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**PLAINTIFFS' RESPONSE TO DEFENDANTS' LISTS OF ALLEGED LEGITIMATE STATE PURPOSES FOR ALABAMA'S DISCRIMINATORY PREMIUM TAX**

COME NOW the Plaintiffs and respond to the Defendants' Lists of Alleged Legitimate State Purposes as follows:

1. Plaintiffs agree that the Lists of Alleged Legitimate State Purposes filed by Defendant Forrester and Defendant/Intervenors contain every conceivable purpose Alabama's legislature might have had in enacting a premium tax statute which discriminates against foreign insurers and Plaintiffs hereby stipulate that such lists are compre-



hensive and complete. Plaintiffs will show the Court, however, through the legislative history of the premium tax statutes in issue that the various alleged purposes in reality distill down to only two: (1) to generate revenues for the State of Alabama at the expense of out-of-state insurers; and (2) to promote the intrastate business of the domestic insurers by giving such insurers the benefit of a discriminatory classification and tax scheme.

2. Plaintiffs reject the assertion that any of the alleged purposes set forth on either list is a "legitimate" purpose in the constitutional sense that would justify the discriminatory classification scheme and rate structure embodied in the Alabama Premium Tax Statutes. No purpose stated on either list would justify charging different tax rates to insurers because of such insurers' state of residence. Moreover, with specific reference to Item 11 appearing on Defendant Forrester's List, the Plaintiffs state that the statute in question discriminates on its face against foreign insurers. Another feature of the statute is a section which allows credits to foreign insurers for investments in the State of Alabama. The alleged purpose advanced by Defendant Forrester in Item 11 is conceivably related only to this second feature of the statute pertaining to tax credits, but is in no way promoted by or relevant to the feature of the statute which discriminates against foreign insurers. Accordingly, Item 11 should be rejected by the Court as irrelevant to the issues before the Court.

3. Plaintiffs will further show the Court that even if one or more of the purposes enumerated by the Defendants can be deemed by the Court to be legitimate, the Alabama Legislature could not have rationally or reasonably believed that the discriminatory premium tax would promote such purposes.

Plaintiffs are prepared to present testimony by recognized experts which will refute the legitimacy, as well

as the rationality, of the alleged purposes as advanced by the Defendants.

/s/ Richard F. Allen
RICHARD F. ALLEN
Attorney for Plaintiffs

Of Counsel:

CAPELL, HOWARD, KNABE
& COBBS, P.A.
57 Adams Avenue
Post Office Box 2069
Montgomery, Alabama 36197
(205) 262-1671

[Certificate of Service omitted in printing]



IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-994-Th [*et al.*]

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation, [*et al.*],
*Plaintiffs,*

—vs—

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, [*et al.*],
*Intervenors.*

[Filed Mar. 22, 1982]

---

**RESPONSE TO LISTS OF DEFENDANT AND DEFENDANTS/INTERVENORS CONTAINING ALLEGED LEGITIMATE STATE PURPOSES FOR ALABAMA'S DISCRIMINATORY PREMIUM TAX**

Now comes the Plaintiffs, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, Twin City Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Life and Accident Company, Hartford Variable Annuity Life Insurance Company, New York Underwriters Insurance Company, and Hartford Life Insurance Company, and, pursuant to this Court's Order of February 19, 1982, in response to the Lists filed by Defendant and Defendants/Intervenors on

March 6, 1962, containing alleged legitimate state purposes for Alabama's discriminatory premium tax, state as follows:

1. The above-named Plaintiffs agree that the List of Alleged Legitimate State Purposes filed by the Defendant Forrester and by the Defendants/Intervenors contain every conceivable purpose the Legislature might have had in enacting a premium tax statute which discriminates against foreign insurers, and Plaintiffs hereby stipulate that such Lists are comprehensive and complete, but Plaintiffs will show the Court by the legislative history of the premium tax statutes that the List of Alleged Purposes actually distill down only to two: (a) to generate revenues to the State of Alabama at the expense of foreign insurers; and (b) to promote the intra-state business of domestic insurers by giving such domestic insurers the benefit of a discriminatory classification and tax scheme.

2. The above-named Plaintiffs further state that the purposes contained in Items 1 through 13 of Defendant's List and Items 2 through 5 in Defendants/Intervenors' List are dependent for their accomplishment upon illegal and unconstitutional means.

3. The above-named Plaintiffs further state that the purpose contained in Item 11 of Defendant Forrester's List relates to the second aspect of the premium tax statute which permits a reduction in the discriminatory effect of the discriminatory premium tax and has no relation to the purpose of the discriminatory tax itself. Accordingly, this purpose should be rejected by this Court in its entirety.

4. The above-named Plaintiffs reject the assertion that any of the alleged purposes set forth on either List is a "legitimate" purpose in the constitutional sense that would justify the discriminatory classification scheme and rate structure embodied in the Alabama premium tax



statutes. No purpose stated on either List will justify charging different tax rates to insurers because of such insurers' state of incorporation or domicile.

5. The above-named Plaintiffs will further show the Court that even if one or more purposes enumerated by the Defendant and Defendants/Intervenors can be deemed by the Court to be a legitimate purpose, the Alabama Legislature could not have rationally or reasonably believed that the discriminatory premium tax would promote such purpose.

Plaintiffs further inform the Court that they expect to produce testimony by recognized experts which will prove that the purposes enumerated by the Defendant and the Defendants/Intervenors are neither "legitimate" nor could have been rationally or reasonably believed by the Alabama Legislature to be accomplished by the discriminatory premium tax.

Respectfully submitted,

/s/ Charles E. Porter
CHARLES E. PORTER

/s/ Henry B. Hardegree
HENRY B. HARDEGREE

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-894-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Appellant/Plaintiff*

vs.

HONORABLE THARPE FORSHEE, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Appellee/Defendant*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation,

*Intervenors*

[Filed Apr. 27, 1982]

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**MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF**

Plaintiff moves the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, a summary judgment in Plaintiff's favor for the relief demanded in its Complaint and for grounds of its motion says that there is no genuine issue as to any material fact, and that the Plaintiff is entitled to a judgment as a matter of law.



This motion is based upon the pleadings, the itemized list of alleged Legitimate Purposes filed by the Defendant and Defendant/Intervenors and the Plaintiff's responses thereto, and affidavits of Mr. Roy Hansen, an officer of the Plaintiff, and Dr. Alfred E. Hoffiander of the UCLA Graduate School of Management, which affidavits will be submitted to the court on or before May 5, 1982.

/s/ Richard F. Allen
RICHARD F. ALLEN
Attorney for
Metropolitan Life Insurance
Company

Of Counsel:

Capell, Howard, Knabe & Cobbs, P.A.
P.O. Box 2069
Montgomery, Alabama 36197
(205) 262-1671

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-996-TH

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporaton,
*Appellant/Plaintiff*

vs.

HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Appellee/Defendant*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation,

*Intervenors*

[Filed Apr. 27, 1982]

---

**MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF**

Plaintiff moves the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, a summary judgment in Plaintiff's favor for the relief demanded in its Complaint and for grounds of its motion says that there is no genuine issue as to any material fact, and that the Plaintiff is entitled to a judgment as a matter of law.



This motion is based upon the pleadings, the itemized list of alleged Legitimate Purposes filed by the Defendant and Defendant/Intervenors and the Plaintiff's responses thereto, and affidavits of David H. Fredericks, an officer of the Plaintiff, and Dr. Alfred E. Hoffiander, of the UCLA Graduate School of Management, which affidavits will be submitted to the Court on or before May 5, 1982.

/s/ Richard F. Allen
RICHARD F. ALLEN
Attorney for
Prudential Property and
Casualty Insurance
Company

Of Counsel:

Capell, Howard, Knabe & Cobbs, P.A.
P.O. Box 2069
Montgomery, Alabama 36197
(205) 262-1671

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

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Civil Action No. 81-996-Th

THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation, et al.,
*Intervenors.*

[Filed Apr. 30, 1982]

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**[DEFENDANT'S] MOTION FOR SUMMARY JUDGMENT**

Defendant moves the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, a summary judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

This motion is based on the complaint, the answer, interrogatories number 78, 79 and 80 and the plaintiff's answers thereto, defendant's List of State Purposes and plaintiff's response thereto, and the affidavits of Dr. Arthur A. Thompson, Jr., Dr. George A. Overstreet, Jr., Ira L. Burleson and Phillip E. Stano, attached and made



a part hereof as Exhibits "A," "B," "C," and "D," respectively.

/s/ Phillip E. Stano
PHILLIP E. STANO

/s/ Warren B. Lightfoot
WARREN B. LIGHTFOOT

/s/ E. Mabry Rogers
E. MABRY ROGERS
Attorneys for Defendant

NOTICE: This motion is set for hearing at 9:00 o'clock, A.M., on Monday, May 10, 1982, before the Honorable H. Randall Thomas, Circuit Judge. ORAL ARGUMENT IS REQUESTED.

/s/ Warren B. Lightfoot
Attorney for Defendant

[Certificate of Service omitted in printing]

**EXHIBIT "A"**

**IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA**

[Title Omitted]

**AFFIDAVIT OF
ARTHUR A. THOMPSON, JR., PH.D.**

STATE OF ALABAMA )
)
JEFFERSON COUNTY )

Before me the undersigned authority in and for said County in said State personally appeared Arthur A. Thompson, Jr., who being by me first duly sworn deposes and says:

1. My name is Arthur A. Thompson, Jr. Attached as Exhibit I to this affidavit is a copy of my current resume, reflecting my education, training, experience and qualifications.

2. At the request of counsel for the defendant I made a study of the purposes and effects of Alabama's differential premium tax policy for foreign and domestic insurance companies. Attached as Exhibit II to this affidavit is the result of this study. The analyses, conclusions and opinions reflected in Exhibit II are my own.

3. The statistical data utilized in Exhibit II were obtained from either (a) publications, (b) summaries and public records of the Alabama Department of Insurance or (c) the survey described in Ira L. Burlason's Affidavit dated April 29, 1982.

4. All publications cited in Exhibit II are in my opinion authoritative, standard and trustworthy. All insurance industry data are taken from standard sources, all



population and economic data are drawn from standard government sources, and both represent to the best of my judgment the best available evidence on the subjects in question. The summaries and public records of the Alabama Department of Insurance which I used in preparing Exhibit II are those described in Phillip E. Stano's Affidavit dated April 29, 1982.

/s/ Arthur A. Thompson, Jr.
ARTHUR A. THOMPSON, JR.

[Subscription Omitted in Printing]

## EXHIBIT 1

### ARTHUR A. THOMPSON, JR.

### CURRENT ACADEMIC POSITION

*Professor* of Economics and Business Administration, College of Commerce and Business Administration, The University of Alabama (September 1974-present).

Office address:
P.O. Box J, University, AL 35486
205/348-6090

Home address:
7004 Lakeview Avenue, N.E., Tuscaloosa, AL 35406
205/349-2110

### PREVIOUS ACADEMIC EXPERIENCE

*Professor* of Economics, College of Commerce and Business Administration, The University of Alabama (September 1970-September 1974).

Visiting Professor (part-time), Graduate School of Business Administration, Northeastern University (Winter-Spring 1974).

Director of Academic Planning, College of Commerce and Business Administration, The University of Alabama (November 1971-November 1972).

Associate Professor of Economics, College of Commerce and Business Administration, The University of Alabama (July 1967-August 1970).

Assistant Professor of Economics, College of Business, Virginia Polytechnic Institute and State University, Blacksburg, Virginia (September 1964-June 1967).

Graduate Teaching Assistant, The University of Tennessee (September 1961-June 1964).



### EDUCATIONAL BACKGROUND

B.S. in Liberal Arts (major: economics; minors: political science, mathematics), The University of Tennessee, June 1961.

Ph.D. in Economics, The University of Tennessee, March 1965.

Visiting Scholar, Harvard Business School, January-June 1974, (sabbatical leave).

### PROFESSIONAL AFFILIATIONS AND MEMBERSHIPS

Member of Editorial Board, *Midsouth Journal of Economics.*

Member: American Economic Association, Southern Economic Association, Western Economic Association, Academy of Management, Southern Management Association, Southern Case Research Association, Midsouth Academy of Economists, Omicron Delta Epsilon, Alpha Kappa Psi.

### AREAS OF TEACHING AND RESEARCH INTEREST

Strategy Management, Competition and Market Analysis, Pricing Behavior, Managerial Economics.

Courses taught: Managerial Strategy and Policy (graduate and undergraduate), Economics of the Firm (graduate and undergraduate), Mathematical Economics (graduate and undergraduate), Managerial Economics (senior level), Money and Banking (junior level), Labor Economics (junior level), Principles of Economics, Principles of Statistics.

### BOOKS AND ARTICLES

with Ron King, "The Entry and Market Share Success of New Brands in Concentrated Markets,"

accepted for publication in *Journal of Business Research*.

with A. J. Strickland, *Cases in Strategic Management*, Forthcoming from Business Publications in March 1982.

*Economics of the Firm: Theory and Practice*, Third Edition (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1981), 585 pages.

with A. J. Strickland, *Strategy and Policy: Concepts and Cases*, Revised Edition (Dallas: Business Publications, Inc., 1981), 825 pages.

"The Kinked Demand Curve Model: A Reinterpretation of Its Significance for Pricing Analysis," *Mid-south Journal of Economics*, 1981.

"Competition as a Strategic Process," *Antitrust Bulletin*, Vol. 25, No. 4 (Winter 1980) pp. 777-803

Co-author with A. J. Strickland, *Strategy Formulation and Implementation: Tasks of the General Manager* (Dallas: Business Publication, Inc., 1980), 825 pp.

Co-author with Larry J. Merville and Grant Newton, *Economics and Business Finance*, Vol. 1 of Certificate in Management Accounting Review Series (San Francisco: Canfield Press, 1978), 177 pages.

Co-author with A. J. Strickland, *Strategy and Policy: Concepts and Cases* (Dallas: Business Publications, Inc., 1978), 950 pp.

*Economics of the Firm: Theory and Practice*, Second Edition (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1977), 624 pp.

Co-author with Richard M. Durand, "The Effects of the Case Approach to Teaching/Learning Upon Attitudes Toward Companies: The Study of an



Electric Utility," *Proceedings of the American Institute for Decision Sciences*, October 1977, pp. 138-140.

"Alabama's Five Economies," in R. H. McKenzie, ed., *The Rising South*, Vol. 2, The University of Alabama Press, 1976, pp. 29-47.

"Corporate Bigness—For Better or for Worse," *Sloan Management Review*, Vol. 17, No. 1 (Fall 1975), pp. 37-41.

"Absolute Firm Size, Administered Prices, and Inflation: An Exploratory Analysis," *Economic Inquiry*, Vol. 12, No. 2 (June 1975), pp. 240-254.

*The Economics of Corporate Capitalism and Corporate Power*, General Learning Press, Modular Series in Economics, 1974, 58 pp.

*The Economics of the Firm: Theory and Practice*, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1973), 591 pp.

"Pricing Patterns of Large Corporations: The Opportunity to Fill a Data Void," *Western Economic Journal*, Vol. X, No. 4 (December 1972), p. 486.

"Business Experience with Industrial Aid Bonds as a Source of External Financing: Some Empirical Evidence," *California Management Review*, Vol. 13, No. 2 (Winter 1970), pp. 25-37.

Co-author with Irwin Weinstock, "Reply to the Theory X Union Leader: Fact or Fiction," *Mississippi Valley Journal of Business and Economics*, Vol. 5, No. 2 (Spring 1970), pp. 99-102.

Co-author with M. Fish, "The Determinants of Fertility: A Theoretical Forecasting Model," *Behavioral Science*, July 1970.

Co-author with W. J. Kluge, "An Evaluation of Alternative Approaches to the Application of Stabili-

nation Policy," *Business Perspectives*, Vol. 7, No. 1 (Fall 1970), pp. 24-32.

"Industrial Revenue Bonds and Regional Development," *The Review of Regional Studies*, Vol 1, No. 1 (Fall 1970), pp. 185-210.

"The Social Benefits of Tax-Exempt Industrial Development Bonds," *Financial Analysts Journal*, November-December 1968, pp. 99-103.

Co-author with I. Weinstock, "Facing the Crisis in Collective Bargaining," *Business Topics*, Vol. 16, No. 13 (Summer 1968), pp. 37-44.

"The Control of Demand-Pull Inflation: A Policy Suggestion," *The Quarterly Review of Economics and Business*, Vol. 8, No. 1 (Spring 1968), pp. 53-60.

"The Case of the Wage-price Guideposts," *Banking*, Vol. 9, No. 4 (October 1967) pp. 41-42.

"Push-Button Fiscal Policy," *Business Topics*, Vol. 15, No. 3 (Summer 1967) pp. 55-60.

"Employee Participation in Decision-Making: The TVA Experience," *Public Personnel Review*, Vol. 28, No. 2 (April 1967), pp. 82-88. Reprinted in Jay Shafritz, ed., A New World: *Readings on Modern Public Personnel Management*, (Chicago: International Personnel Management Association, 1975), pp. 80-86.

"The Attempt to Establish a National Wage-Price Policy," *Labor Law Journal*, Vol. 18, No. 4 (April 1967), pp. 17-28.

Co-author with I. Weinstock, "Administrative Sensitivity to Economic Needs of Employees: Some Distorting Mechanisms," *Academy of Management Journal*, Vol. 10, No. 1 (March 1967), pp. 17-28.



Co-author with I. Weinstock, "White-Collar Employees and the Unions at TVA," *Personnel Journal*, Vol. 46, No. 1 (January 1967), pp. 14-21.

"Collective Bargaining in the Public Service—The TVA Experience and Its Implications for Other Government Agencies," *Labor Law Journal*, Vol. 17, No. 2 (February 1966), pp. 99-99; reprinted in *Collective Negotiation for Public and Professional Employees*, edited by R. Wandworth and R. Peterson, Scott, Foresman and Company, 1969.

## RESEARCH MONOGRAPHS

*The Five Economies of Alabama: Patterns of Rural and Urban Economic Development* (with Statistical Appendix), a monograph published by the Center for Business and Economic Research, The University of Alabama, 1974.

Senior author, *Industrial Development Bond Financing: Business and Community Viewpoints and Opinions*, published by the Alabama Business Research Council, February 1970, 132 pp. (reviewed in the December 1970 issue of the *Journal of Finance*).

*An Analysis of the Population and Economic Characteristics of Alabama, 1950-1970*, Center for Business and Economic Research, The University of Alabama, 1972, 195 pp.

Co-author with J. F. Vallery, Jr., William D. Gunther, and Charles L. Joiner, *A Public Investment Strategy for the Economic Development of Appalachian Alabama: Analysis and Alternatives*. A research report under contractual agreement with State of Alabama Office of Program Development and financed by a Federal grant from the Appalachian Regional Commission, September 1970.

Co-author with D. C. Dunton et al., *Growth Potential of Southwestern Virginia*, report submitted to Division of Industrial Development and Planning, Commonwealth of Virginia, March 1966, 70 pages.

BOOK REVIEWS

Review of F. Ray Marshall and Lamond Godwin, *Cooperatives and Rural Poverty in the South* in *Growth and Change*, Vol. 3, No. 1 (January 1972), pp. 53-54.

Review of F. M. Scherer, *Industrial Market Structure and Economic Performance* and W. C. Shepard, *Market Power and Economic Welfare* in *Southern Economic Journal*, Vol. 38, No. 2 (October 1971), pp. 269-71.

Review of *The New Industrial State*, by John Kenneth Galbraith, *Southern Economic Journal*, Vol. 35, No. 3 (January 1969), pp. 292-294.

CASE STUDY RESEARCH

"Philip Morris, Inc.," published in Thompson and Strickland, *Cases in Strategic Management* (Dallas: Business Publications, Inc., 1982).

"Turner Broadcasting Systems, Inc., published in Thompson and Strickland, *Cases in Strategic Management* (Dallas: Business Pub. Inc., 1982).

"Alabama Power Company," (revised 1979 version), published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases*, Revised Edition, (Dallas: Business Publications, Inc., 1981).

"A Note on the World Petroleum Industry" with Victor Gray (1980); published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases*, Revised Edition (Dallas: Business Publications, Inc., 1981).



"Exxon Corporation" (revised 1980 version) with Victor Gray; published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases*, Revised Edition (Dallas: Business Publications, Inc., 1981).

"Mobil Corporation" (revised 1980 version) with Victor Gray; published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases*, Revised Edition (Dallas: Business Publications, Inc., 1981).

"Exxon Corporation," with Victor Gray (1977); published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases* (Dallas: Business Publications, Inc., 1978), pp. 722-769.

"Mobil Corporation," with Victor Gray (1977); published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases* (Dallas: Business Publications, Inc., 1978), pp. 770-808.

"A Note on the Petroleum Industry," with Victor Gray (1977); published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases* (Dallas: Business Publications, Inc., 1978), pp. 686-721.

"Consolidated Edison Company," with Robert J. Litschert (1977); published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases* (Dallas: Business Publications, Inc., 1978), pp. 857-884.

"Alabama Power Company," (revised 1976 version), distributed by ICCH and published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases* (Dallas: Business Publications, Inc., 1978) pp. 809-856.

"Top Plastics Company," with G. P. Shows, M. M. Mayer and A. J. Strickland, (1974); published in

Schellenberger and Boseman, *Policy Formulation and Strategy Management*, Wiley/Hamilton, 1978.

"Bell Associates," with C. R. Scott and A. J. Strickland, distributed by ICCH; published in Tate, Megginson, Scott, and Trueblood, *Successful Small Business Management* (Dallas: Business Publications, Inc., 1975), pp. 532-539.

"Wall Street Journal vs. Combustion Engineering," with A. J. Strickland (1975), distributed by ICCH; published in Thompson and Strickland, *Strategy and Policy: Concepts and Cases* (Dallas: Business Publications, Inc., 1978), pp. 931-944.

"Alabama Power Company (A), (B), and (C)," with A. J. Strickland and C. R. Scott, distributed by ICCH, (1973 and 1975).

## OTHER PUBLICATIONS

*Instructor's Manual* to accompany the Third Edition of *Economics of the Firm: Theory and Practice*, Prentice-Hall, Inc., 1981, 140 pp.

With A. J. Strickland, *Instructor's Manual* to accompany the Revised Edition of *Strategy and Policy: Concepts and Cases*, Business Publications, Inc., 1981, 200 pages.

With A. J. Strickland, *Instructor's Manual* to accompany *Strategy and Policy: Concepts and Cases*, Business Publications, Inc., 1978, 200 pp.

*Instructor's Manual* to accompany second edition of *Economics of the Firm; Theory and Practice*, Prentice-Hall, Inc., 1977, 137 pp.

With Carolyn Sawyer, "Commuting to Work Patterns in Alabama, 1960-1970," *Alabama Business*, Vol. 44, No. 1 (October 1973), pp. 2-6.



Co-author with Kelvin Lancaster, *Instructor's Manual* to accompany *Modern Economics: Principles and Policies*, published by Rand McNally & Company, 1973.

"Manufacturing," *Atlas of Alabama*, University of Alabama Press, 1973, pp. 84-85.

*Instructor's Manual* to accompany *Economics of the Firm: Theory and Practice*, published by Prentice-Hall, 1973, 150 pp.

"Manufacturing Expansion in Alabama, 1960-1971," *Alabama Business*, Vol. 43, No. 1 (September 1972), pp. 1-6.

"An Analysis of Income Patterns in Alabama," *Alabama Business*, Vol. 42, No. 11 (July 1972), pp. 1-6.

"Employment Trends in Alabama," *Alabama Business*, Vol. 42, No. 12 (August 1972) pp. 1-6.

"Computation of the Annual Compound Rate of Change in an Economic Variable," *Fortran Applications in Business Administration*, Vol. 1, edited by Thomas J. Schriber and Laurence A. Maden, The Graduate School of Business Administration, The University of Michigan, (July 1970), pp. 215-220.

"Computation of a Price Index," *Fortran Applications in Business Administration*, Vol. 1, edited by Thomas J. Schriber and Laurence A. Maden, The Graduate School of Business Administration, The University of Michigan, (July 1970) pp. 221-225.

"A Survey of Industrial Aid Bond Financing in Alabama," *Alabama Municipal Journal*, Vol. 26, No. 12 (June 1969), pp. 7, 15-21.

"Growth Patterns and Developmental Prospects in Non-Appalachian Alabama," *Alabama Business*, Vol. 38, No. 11 (July 15, 1968), pp. 1-5.

"Primary and Secondary Growth Regions in Appalachian Alabama," *Alabama Business*, Vol. 38, No. 10 (June 15, 1968), pp. 1-6.

"Tax Policy and the Control of Demand-Pull Inflation," *Virginia Social Science Journal*, Vol. 3, No. 1 (April 1968), pp. 30-39.

"An Alternate to the Ten Percent Surtax for Growth and Stable Prices," *The Commercial and Financial Chronicle*, Vol. 206, No. 6718 (September 21, 1967).

"New Economics is Unsuitable for Short-Run Instability," *The Commercial and Financial Chronicle*, Vol. 206, No. 6700 (July 20, 1967), pp. 3, 26.

"Why Businessmen Should Resist the Administration's Wage-Price Policy," *Alabama Business*, Vol. 38, No. 8, (April 15, 1967), pp. 1-5.

"The New Wage-Price Guideposts Remain Self-Defeating," *The Commercial and Financial Chronicle*, Vol. 205, No. 6668 (March 30, 1967), pp. 17.

"The Utopian Economics of the Great Society," *The Commercial and Financial Chronicle*, Vol. 204, No. 6592 (July 1966), pp. 3, 26-7.

WORK IN PROGRESS

with Oded Gur-Arie, "The Market Segmentation Portfolio Matrix." submitted for review.

"The Implications of Corporate Strategy for Competition and Market Analysis: An Expanded Role for the Business Economist," Submitted for review.

"The Strategic Dilemma of the Electric Utilities."

PROFESSIONAL ACTIVITIES

Referee, Papers submitted on business policy, Southwestern Academy of Management, Fall 1981.

Presented "The Implications of Corporate Strategy for Competition & Market Analysis, at the 1981 meetings of the Western Economic Association & the National Association of Business Economists, San Francisco, July 1-6, 1981.



Chaired a panel on "What Should We Be Teaching in the Intermediate Microeconomics Course" 1981 meetings of Midsouth Academy of Economics, Memphis, Tenn., February 1981.

Presented "The Kinked Oligopoly Demand Curve: Its Significance for Pricing Analysis," at the 1979 conference of the Western Economic Association, Las Vegas, Nevada.

Chairman, session on "Business Strategy and Policy," 1979 meeting of Southern Management Association, Atlanta, Georgia.

Presented "The Entry and Success of New Brands into Concentrated Markets," co-authored with R. H. King, at the 1978 annual meeting of the Western Economic Association, Honolulu, Hawaii.

Presented "Competition As a Strategic Process," at the 1977 annual meeting of the Southern Economic Association, New Orleans, Louisiana.

Presented "The Effects of the Case Approach to Teaching/Learning upon Attitudes toward Companies: The Study of an Electric Utility," co-authored with Richard Durand, at the 9th Annual Conference of the American Institute for Decision Sciences, Chicago, Illinois, October 1977.

Chairman, session on "Pricing Behavior," 1976 meeting of Western Economic Association, San Francisco.

Presented "Alabama Power Company (B) and (C)" cases at Fall 1975 case workshop of Intercollegiate Case Clearing House and Southern Case Research Association-Intercollegiate Case Clearinghouse Workshop, Atlanta, Georgia, November 1974.

Presented "The *Wall Street Journal* vs. Combustion Engineering," case at the Southern Case Research Association-Intercollegiate Case Clearinghouse Workshop, Atlanta, Georgia, November 1974.

Chairman of session on "Issues in the Economics of Taxation Policy," Southern Economic Association meetings, Houston, Texas, November 1973.

Presented "Alabama Power Company (A)," case at the Southern Case Research Association-Intercollegiate Case Clearinghouse Workshop, Houston, Texas, November 1973.

Presented "The Relative Contribution of Large-Scale and Small-Scale Enterprises to Price Stability," co-authored with D. J. Hooks, presented at the 1972 meeting of the Southern Economic Association, Washington, DC.

Co-author with E. Ranelli, "The Goals of Large Corporations: Some Empirical Evidence," presented at the 1970 meeting of the Southern Economic Association, Atlanta, Georgia.

Co-author with W. J. Kinges, "Some Neglected Factors in the Application of Countercyclical Taxation Policy," presented at the 1969 meetings of the Southern Economic Association, St. Louis, Missouri.

Participant in two-week workshop on "How to Use Computers in the Solution of Business Problems," The University of Michigan, July 7-18, 1969.

"The Contribution of Industrial Aid Bond Financing to Regional Economic Development, presented at the meeting of the Southeastern Regional Science Association at Chapel Hill, North Carolina, April 1969.



"Alabama's Experience with Industrial Aid Bond Financing," presented at the 1969 meeting of the Alabama Academy of Science at Mobile, Alabama.

Served as discussant for session on "Industrial Location" at the 1969 meeting of the Southern Economic Association.

Co-author with M. Fish, "A Market Process Analysis for Fertility Determination," presented at the 1968 meeting of the Southern Economic Association.

"Primary and Secondary Growth Regions in Appalachian Alabama," a paper presented at the 1969 meeting of the Alabama Academy of Science.

Served as discussant for a paper on the "Wage-Price Guideposts" by I. Siegel at the 1968 meeting of the Southern Economic Association.

HONORS

Member, Editorial Review Board, *Midsouth Journal of Economics*, 1978-1981.

Outstanding Young Men of America, 1974.

American Men and Women in Science, 1974.

Beta Gamma Sigma, 1974.

Named "Outstanding Professor" by Commerce Graduate Student Association, 1972-73.

Outstanding Educator of America, 1972.

Who's Who in the South and Southwest, 1972-present.

Participant in Humble Oil Company (Exxon) Faculty Forum, April 1972.

Awarded a Fellowship in the 1970 Economics-in-Action Program, Case Western University, June 15-July 1, 1970.

Awarded a Fellowship in the 1965 College-Business Exchange Program sponsored by the Foundation for Economic Education, during which six weeks were spent studying the operations of the Virginia Electric and Power Company.

## UNIVERSITY SERVICE AND COMMITTEES

Chairman, Ad-Hoc University Committee on Governance, 1980-1981.

Vice-Chairman, Governor's Committee to Fight Inflation, State of Alabama, 1974-75.

Chairman, University Self-Study Committee on Undergraduate Programs, 1972-73.

Vice-Chairman, Faculty Forum, College of Commerce and Business Administration, University of Alabama, 1970-71.

Chairman, Promotion and Tenure Committee, Management and Marketing Area, 1977, 1978, 1979.

Chairman, Master's Programs Committee, Graduate School of Business, 1970-71.

Chairman, MBA Committee, Graduate School of Business, 1977-1978.

Faculty Advisor to the University of Alabama chapter of Alpha Kappa Psi, 1968-1970.

Member of:

Faculty Senate, 1979-81

Academic Affairs Committee, Faculty Senate, 1979-1981

C & BA Faculty Executive Board, 1979-81.

Resources and Priorities Committee, 1980-1981

University Press Committee, 1978



University Graduate Council, 1973-81

University Supply Store Advisory Committee, 1976-1977

MBA Committee, 1969-70, 1974-75, 1976-77, 1977-78

Intercollegiate Athletics Committee, 1973-75

Advisory Committee on University Curriculum, 1972-75

Planning and Coordinating Committee, 1970-72

Quantitative Methods Committee, 1967-70

Undergraduate Programs Committee, 1969-70

Research Development Committee, 1969-70

Educational TV and Instructional Media Committee, 1969-73

Physical Facilities Committee, 1968-69

Business Library Committee, 1967-69

Honors Day Committee, 1968-69

Sabbatical Leave Policy Committee, 1968-69

New Faculty Orientation Committee, 1968-69

Pre-Law Studies Committee, 1969-72

Ad Hoc Committee on Publications (Chairman), 1968-69

**EXHIBIT II**

A Study of the

# State Purposes and Effects of a Differential Premium Tax Policy for Foreign and Domestic Insurance Companies

Arthur A. Thompson, Jr., Ph.D.

April 1982



## I. Introduction

This is a study of state purposes for taxing "domestic" insurance companies at a lower rate than "foreign" insurance companies. The term "domestic insurance company" is generally used to mean an insurance company incorporated and domiciled in the given state in question; a "foreign" insurance company is generally understood to refer to a company incorporated under the laws of another state and with its principal headquarters located in another state. Thus, an insurance company incorporated under Alabama law and headquartered in Alabama would be a domestic company insofar as Alabama is concerned and a foreign company insofar as concerns all the other states in which it might do business.

A 1977 survey conducted under the auspices of the Council of State Governments reported that all 50 states imposed an insurance premium tax on either foreign companies or domestic companies, or both.[1] Among the Council's survey findings were three facets of insurance premium taxation among the 50 states:[2]

> 1. *Variations in Domestic Insurance Premium Taxation.* There is a variation among states in domestic insurance premium taxation in terms of (a) what types of insurance are taxed (i.e., life, workmen's compensation, etc.), and (b) the tax rate. The tax rates for domestic insurance premiums vary from 0 percent [Arkansas, Florida, Illinois, Kentucky (life only), Michigan, Ohio, Oklahoma, and Wisconsin] to 3 percent [West Virginia (on all types), Missouri (for workmen's compensation only), Utah (3.25 percent for workmen's only), and Texas (3.85 percent for insurance premiums other than life, health and annuity)]. The most frequently used rate is 2 percent.

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[1] Council of State Governments, *State Retaliatory Taxation of the Insurance Industry*, Lexington, Kentucky, 1977, p. 8.

[2] *Ibid.*, p. 9.

2. *Variations in Foreign Insurance Premium Taxation.* As with domestic insurance premium taxation, there is great variation among states in foreign insurance premium taxation in terms of the type of insurance taxed and the tax rates. The tax rates for foreign insurance premiums vary from 1 percent [Alabama (annuities only) to 4 percent [Oklahoma (on all types) and North Carolina (on workmen's compensation)]. The most frequently used rate is 2 percent. It is interesting to note that Alabama has a 3 percent foreign rate for life and 4 percent foreign rate for all others.

3. *Variations in the Realtionships of Domestic to Foreign Insurance Premium Taxation Rates.* Twenty-eight states have premium tax rates on some or all types of insurance which discriminate in favor of the domestic insurance companies: Alabama, Alaska, Arizona, Arkansas, California *, Colorado *, Florida, Hawaii, Idaho *, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Mississippi, Nebraska, North Carolina, North Dakota *, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming. (Those states with an asterisk indicate that although the rates specified are the same for domestic and foreign companies, discrimination is achieved through special exemptions.) The differences range from as little as 1 percent higher for foreign companies in Arizona, Kansas, Maine, Washington, and Wyoming to 4 percent higher for foreign companies in Oklahoma. Twenty-two states and the District of Columbia have the same insurance premium tax rates for domestic and foreign insurance premium taxes: Connecticut, Delaware, Georgia, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, and the District of Columbia.



Appendix A of this study contains a table summarizing the Council's findings on the domestic and foreign life insurance premium tax rates imposed by each of the 50 states and the District of Columbia.

The author is unaware of any significant change in premium tax policies in any of the 50 states since the Council of State Governments' survey. All 24 states with a lower premium tax rate for domestic life companies in 1977 still had such a policy in effect as of January 1982. Four of the five state (California, Colorado, Idaho, and North Dakota) with equal premium tax rates but with special exemptions for domestic companies currently (as of January 1982) appear to have such policies in place. (South Carolina's tax is the same as it was in 1977, but its classification may more properly be made with differential premium tax cases.) The other 22 states and the District of Columbia have continued to impose equal premium tax rates on foreign and domestic companies, with few, if any, changes in the rates.

In exploring statistical evidence regarding differential premium taxation, insurance industry data was compiled and examined for all 24 states reported by the Council as having a policy of imposing a lower premium tax rate on domestic companies; these states include Alabama, Alaska, Arizona, Arkansas, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming.[9] To simplify and facilitate the analysis and

[9] It should be noted that this listing of states differs from the Council's 24-state listing in one respect: Tennessee is included and South Carolina is excluded. Tennessee is included among the 24 States with a differential tax because it imposes a 1.75% premium tax on

interpretation, states which used various types of exemptions and exceptions to create effective tax rate differentials between foreign and domestic companies were not included as part of the group of states with differential premium taxes.

Because the chief purpose of this study was to provide specific evidence on Alabama's experience with a differential premium tax policy and because the Alabama statute authorizing premium tax differentials has some features specific to Alabama and to its economic situation, data on Alabama's insurance industry was examined much more intensively than in the other 23 states with lower premium tax rates for domestic companies.

## II. Identification of the State Purposes for Differential Taxation of Foreign and Domestic Insurance Companies

It is easy to conceive of a number of sound state purposes for Alabama's two-pronged policy of (1) imposing a 1% premium tax on domestic insurers versus a 3% premium tax on foreign life insurers and a 4% premium tax on other types of foreign insurers and (2) offering,

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domestic life companies and a 2.66% premium tax on foreign life companies; even though the premium tax is equal for foreign and domestic insurers for all other types of insurance, the significance of the life segment is so great as to warrant including Tennessee in the differential tax grouping of states. South Carolina was excluded because (1) its discrimination was hidden owing to it being legislatively enacted as a special 1% graduated license fee, thus causing it to be overlooked until it was too late to include South Carolina in the compilation and (2) the size of its foreign and domestic differential is partly achieved through a cap on the premium tax paid by domestic insurers equal to 5% of the domestic's net income. The latter provision means that the effective size of the differential is partly *dependent* on the amount of a domestic company's income rather than on its status as a domestic. Moreover, since the size of the foreign versus domestic differential in South Carolina tends to vary from domestic company to domestic company and time to time (depending on the relation of premiums to net income), interpretation of the impact of South Carolina's provisions was hindered.



on an attractive sliding scale basis, up to a full 1% reduction in this premium tax rate on foreign insurers if they allocate 10% of their assets to Alabama investments. Anyone familiar with the rudiments of economic and business analysis could have believed and, using *a priori* reasoning, rationally predicted that the following set of benefits and results would flow from Alabama's premium tax policy:

1. With effective tax incentives to encourage the formation of new insurance companies domiciled within Alabama, the state stands to gain the economic benefits of the added job opportunities, employment, and payrolls associated with locating more insurance company headquarters in Alabama communities.

2. By promoting the growth and development of domestic insurance companies capable of competing on a more equal footing with large, well-established, out-of-state companies, the outcome should be a more lively and vigorously competitive market for insurance within Alabama.

3. The range of customer choice among alternative insurance companies will tend to be extended by the creation of a competitively viable domestic insurance industry.

4. A policy of differential taxation will assist young, relatively small domestic companies to compete on a more economical basis with large, well-established, out-of-state companies, thereby making the insurance market in Alabama more contestable.

5. The barriers to entry into Alabama's insurance industry will tend to be reduced.

6. The use of insurance will tend to be encouraged, with the result that more Alabama citizens can gain access to the many benefits that adequate insurance protection provides.

7. The average level of insurance coverage per family in Alabama will tend to be enhanced.

8. The use of insurance by Alabama families will tend to be more widespread.

9. Alabama families and Alabama businesses will, to an increased degree, be encouraged to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, accidents, and other such calamities as may cause them debilitating financial losses.

10. There will tend to be greater availability of insurance policies and services in rural and sparsely populated sections of Alabama.

11. There will tend to be a higher rate of economic development in the state of Alabama stemming from the tax incentives offered to foreign insurers to invest increased amounts of capital in Alabama projects.

12. Because domestic insurance companies typically invest a far higher percentage of their admitted assets in state projects than do foreign companies, capital availability for statewide economic growth will tend to be enhanced.

13. The adverse capital drain which the activities of many foreign insurance companies can have on the economy of Alabama will tend to be reduced (owing to the investment incentive features).

14. The revenues of the state treasury will be increased.

These are sound, logical state purposes and benefits. None are farfetched and all tend to be beneficial, in one way or another, to both the citizens of the state and to the state's economy. Significantly, each and every one of these purposes and benefits is rooted in standard economic theory and business analysis. Hence, state legislators, either personally knowledgeable in business and economic matters or exposed to the arguments of those with such knowledge, could rationally be attracted to enact differential premium tax legislation so as to secure the expected benefits for the state's economy and citizenry.



The body of the study which follows contains two main thrusts:

1. An expansion of the logic and rationale underlying the purposes of differential premium taxation of foreign and domestic insurance companies.

2. Presentation of statistical evidence regarding the extent to which these expected state purposes are *actually being achieved.*

## III. Explanation and Evidence

### *State Purpose # 1 and Its Effects*

***To encourage the formation of new insurance companies domiciled within Alabama, thereby gaining the economic benefits that the added job opportunities, employment, and payrolls can provide to the Alabama communities in which such headquarters facilities may be located.***

The existence of a lower premium tax for domestic insurance companies creates an incentive for an insurance company to locate its home office in a state where such a tax advantage can be obtained. Such a differential premium tax advantage is not, of course, the only locational consideration, but it is surely a positive factor. The power of a lower premium tax in influencing headquarters location is most felt in the case of small, fledging firms whose primary target market lies within a single state; such firms, because of their one-state operating focus, are less affected by whatever retaliatory premium tax provisions may prevail in other states and may, therefore, be reasonably presumed to place a higher value

on a lower domestic premium tax rate than would large, multi-state companies.

The available evidence strongly supports the ability of a lower premium tax rate for domestic insurance companies to influence where an insurance company is domiciled. Thompson Exhibit 1 shows the 40-year trend in the number of life insurance companies in the United States and in the number and percent of these companies that are domiciled in states with differential premium tax rate provisions. All 24 of the states included in Exhibit 1 maintained a differential premium tax rate for domestic and foreign life insurance companies during the 1970-1980 period, and most of the 24 states had a lower domestic premium tax throughout the period 1960-1980.[4] The telling features of Thompson Exhibit 1 are highlighted below:

| | Number of Life Insurance Companies | | |
|---|---|---|---|
| Mid-Year | In States with Differential Premium Taxes | U.S. Total | Percent in States with a Differential Premium Tax |
| 1980 | 1,298 | 1,931 | 67.2% |
| 1975 | 1,176 | 1,797 | 65.4% |
| 1970 | 1,169 | 1,819 | 64.3% |
| 1965 | 982 | 1,624 | 60.5% |
| 1960 | 861 | 1,439 | 59.8% |

[4] Appendix A contains a summary table of the premium tax rates in the 50 states as of 1977. Appendix B of this study contains an abbrevinted legislative history of key premium tax provisions for foreign and domestic insurance companies in these 24 states during the period 1945-1981; this information was researched and compiled by the legal staff at Bradley, Arant, Rose, and White, counsel for the defendants. Appendices A and B were relied upon as the basis for compiling statistics on the insurance industry and developing comparisons between states with differential premium taxes and those with equal premium taxes for foreign and domestic firms.



Two facts stand out:

1. The percentage of life insurance companies domiciled in states with lower premium taxes for domestic companies has grown—from 59.8% in 1960 to 64.3% in 1970 to 67.2% in 1980.

2. From 1960 to 1980 the reported number of life insurance companies in the U.S. rose from 1,439 to 1,931—a net gain of 492 companies; of this total gain of 492 companies, 437 companies (88.8% of the total gain) were domiciled in states with a lower premium tax for domestic life companies.

The unequivocal conclusion is that the location of life insurance company headquarters definitely does have something to do with a lower premium tax for domestic companies.

Thompson Exhibit 2 presents data on the number and percent of property and casualty companies domiciled in 24 states with differential premium tax rates for foreign and domestic firms. State-by-state breakdowns of the number of companies were compiled for the period 1965-1981; comparable data was not available for 1960 and years prior. The most pertinent features of this exhibit are tabulated below:

| | Number of Property and Casualty Companies | | |
|---|---|---|---|
| Mid-Year | In States with Differential Premium Taxes | U.S. Total | Percent in States with a Differential Premium Tax |
| 1981 | 1,514 | 2,953 | 51.6% |
| 1980 | 1,485 | 2,867 | 51.8% |
| 1975 | 1,490 | 2,934 | 50.8% |
| 1970 | 1,411 | 2,831 | 49.8% |
| 1965 | 1,501 | 3,161 | 47.5% |

The trends here, though less pronounced than for life companies, show an increased percentage of property and casualty companies domiciled in states with lower premium tax rates for domestic companies. Whereas between 1965 and 1981 the total number of property and casualty companies *declined* by 6.6% (208 companies), the number in states with a more favorable premium tax structure for domestic companies *rose* by 0.9% (13 companies).

While the statistics in Thompson Exhibits 1 and 2 provide impressive support of the helpfulness of a lower domestic premium tax in attracting the headquarters' location of insurance companies and thereby capturing the attendant jobs and payrolls, they tell only part of the story. The 1960-1981 figures for Alabama in these two exhibits, summarized below, are an excellent case in point:

| | Number of Insurance Companies Domiciled in Alabama | |
|---|---|---|
| Mid-Year | Life Companies | Property and Casualty Companies |
| 1981 | 34* | 21 |
| 1980 | 34 | 21 |
| 1975 | 39 | 22 |
| 1970 | 54 | 22 |
| 1965 | 43 | 22 |
| 1960 | 42 | 18 |

* Based on Alabama Department of Insurance Records (not shown in Thompson Exhibit 1).

The decline in the number of domestic life companies and the essentially stable number of domestic property and casualty companies since 1960 suggest that Alabama's lower domestic premium tax rates were without much impact on domestic formations. On deeper examination, however, such proves not to be the case. During the



1960-1981 period, the records of the Alabama Department of Insurance reveal that there were 49 new life insurance companies and 14 new property and casualty companies formed in Alabama—an average of 3 new companies per year. The *net* changes in Alabama's number of domestic insurance companies (Thompson Exhibits 1 and 2) were much smaller for five reasons:

1. Some Alabama-domiciled insurance companies entered into mergers with or were acquired by another insurance company (domestic or foreign). Alabama Department of Insurance records for the 1960-1981 period show 35 mergers involving various types of domestic insurance companies.

2. A number of Alabama's domestic insurance companies failed and were either voluntarily dissolved or else put into receivership—their policies and business being reinsured and taken over by other companies (domestic or foreign). Alabama Department of Insurance records for 1960-1981 reveal 51 domestic company failures of various types (voluntary dissolution, failure to renew license, receivership, suspension or revoking of license).[5]

3. In 1969 the Alabama Legislature redefined a foreign insurance company to include (1) any insurance company organized under the laws of a state or country other than Alabama *and* (2) any insurance company organized under the laws of Alabama which maintained its principal office or chief place of business outside Alabama. Previously, under a 1955 Act, a foreign insurance company was defined only as an insurance company organized under laws of a country or state other than Alabama; a company was thus entitled to "domestic" status if it was

[5] These 51 failures involved all types of domestic insurance companies licensed to do business in Alabama and were not restricted to just life and property and casualty companies.

organized under Alabama law even though its headquarters operations were located in another state. The new 1969 definition caused several companies previously defined as domestic companies to be reclassified as foreign companies.

4. Several companies formerly domiciled in Alabama chose to relocate and were thus "redomesticated" to other states; two such cases occurred in Alabama during the 1960-1981 period according to Alabama Department of Insurance records.

5. A number of companies converted from one type of insurance company to another (from mutual aid to legal reserve, from life to property and casualty, and so on), thus altering the number of domestic companies in any one classification. During the 1960-1981 period, there were 10 conversions from one type insurance company to another.

The net decline in the number of domestic life insurance companies in Alabama from a reported 54 in 1970 to 34 in 1980 and the stable number of domestic property and casualty companies in Alabama since 1965 is thus fully explained by the statewide mix of new domestic company formations, domestic failures, mergers/acquisitions involving domestic companies, and conversions. Throughout the 1960-1981 period, the number of new domestic company formations has actually been quite significant (a total of 63 new life and P & C companies were formed and domiciled in Alabama over the 21-year period)—a statistic which supports the contention that a lower premium tax for domestic firms does work to further the state's purpose of encouraging insurance companies to locate their headquarters facilities in Alabama.

The jobs and payrolls associated with the headquarters operations of domestic insurance companies in Alabama cannot be lightly dismissed. Information furnished by just 15 domestic companies regarding the number of



home office employees and home office payrolls in 1981 showed the following:

| Company | 1981 Headquarters Employment | 1981 Headquarters Payroll |
|---|---|---|
| Old Southern Life Insurance Co. | 57 | $ 817,103 |
| Alabama Farm Bureau Mutual Casualty Ins. Co. | 360 | 5,392,742 |
| Champion Insurance Co. | 45 | 502,958 |
| American Liberty Insurance Co. | 99 | 1,355,000 |
| Life Insurance Company of Alabama | 98 | 1,366,784 |
| National Security Fire and Casualty Co. | 30 | 345,029 |
| National Security Insurance Co. | 53 | 749,675 |
| Employers Life Insurance Co. of Alabama | 20 | 329,861 |
| Mutual Assurance Society of Alabama | 30 | 494,460 |
| Loyal American Life Insurance Co. | 80 | 1,153,052 |
| Mutual Savings Life Insurance Co. | 251 | 2,660,885 |
| Southern United Life Insurance Co. | 61 | 874,524 |
| Protective Life Insurance Co. | 379 | 7,800,000 |
| Southern Guaranty Insurance Co. | 66 | 913,982 |
| Liberty National Life Insurance Co. | 1,042 | 18,935,420 |
| | 2,671 | $43,691,475 |

Source: responses to survey forms sent out by Association of Alabama Life Insurance Companies.

The average 1981 wage per home office job for these 15 companies was $16,358—an amount which compares very favorably with the approximately $14,650 annual wage in manufacturing in Alabama in 1981 and the approximately $13,750 annual wage in 1981 in all jobs in Alabama

covered by unemployment compensation insurance. Because of the well-known "multiplier effect," the total cumulative economic impact of the headquarters jobs and payrolls can, conservatively, be said to be in the range of 1.5-2.0 times the actual amount of insurance-company-related jobs and payrolls.

*State Purpose #2 and Its Effects*

*To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on a more equal footing with well-established, out-of-state companies.* The existence of viable domestic insurance companies adds a new and important source of competition for large, nationally-known companies; having both foreign and domestic companies in vigorous competition with each other for customer patronage makes the insurance marketplace more contestable and increases the likelihood that all insurance companies (both foreign and domestic) will have to provide more attractive rates and levels of service to the general public.

The essence of competition is the presence of a number of rival sellers, each independently and aggressively striving for buyer patronage. However, competitive vigor is governed not only by spirited rivalry among more and more sellers but also by the diversity among types of sellers. Thus, while it is well and good to have more and more foreign insurance companies competing to meet buyers' insurance needs, the forces of competition are enhanced when foreign companies, some or many of which may be large, nationally-known firms, find themselves also in competition with a healthy contingent of domestic insurance companies. There can be little doubt that the added presence of domestic firms makes statewide insurance markets more contestable and more competitive—an outcome that is decidedly "pro-consumer" and to the benefit of insurance purchasers.



Evidence that domestic life insurance companies and domestic property and casualty firms have indeed made the insurance marketplace in Alabama more contestable is shown in Thompson Exhibit 3. Domestic companies, in both the life and property and casualty market segments, have been able to capture significant shares of the statewide insurance market:

| Year | Percent of Total Life Insurance* Premiums Written by Domestic Firms | Percent of Total Property and Casualty** Premiums Written by Domestic Firms |
|---|---|---|
| 1955 | 43.0% | 13.7% |
| 1960 | 44.1 | 11.8 |
| 1965 | 47.7 | 10.6 |
| 1970 | 42.4 | 10.6 |
| 1975 | 39.5 | 12.0 |
| 1930 | 43.8 | 13.2 |

* Includes life, accident and health, mutual aids, and Blue Cross/Blue Shield.

** Includes multiple-peril, liability, automobile coverage, and title.
Source: Alabama Department of Insurance records and reports.

The market shares earned by Alabama's domestic insurance companies are plainly large enough and important enough to justify the conclusion that domestic firms do provide a meaningful additional source of competition for foreign companies, thereby enhancing the *overall* strength and vigor of competition in Alabama's insurance market.

The market shares of foreign and domestic *life* insurers merit closer examination, however, because of the size of the premiums for Blue Cross-Blue Shield insurance. When Blue Cross-Blue Shield premiums are excluded from the Alabama figures, the following market share pattern emerges:

**Percentage Share of Total Life Insurance Premiums Written in Alabama (exclusive of Blue Cross-Blue Shield)**

| Year | Domestic Firms | Foreign Firms |
|---|---|---|
| 1955 | 38.5% | 61.5% |
| 1960 | 38.0 | 62.0 |
| 1965 | 39.6 | 60.4 |
| 1970 | 31.3 | 68.7 |
| 1975 | 25.9 | 74.1 |
| 1980 | 25.1 | 74.9 |

What these market share percentages show very clearly is that foreign life insurers have been competitively successful in capturing a larger proportion of the life insurance business in Alabama, *despite the premium tax differential* for domestic firms. Even though the premiums written by domestic life insurers have grown rapidly (from $55.4 million in 1955 to $302.1 million in 1980—an average annual compound rate of 6.3%), the premiums written by foreign life insurers have risen *more* rapidly (from $104.5 million in 1955 to $900.9 million in 1980—an average annual rate of 9.0%). Hence, Alabama's differential premium tax has had a pro-competitive impact—foreign insurers have continued to thrive and domestic insurers have been able to carve out a respectable enough and large enough market share to serve as a valuable source of added competition.

In sum, while the market share percentages of domestic companies in both the life segment and the property and casualty segment are of a size to make them a factor to be contended with in the marketplace, foreign insurers continue to dominate the market in Alabama, with market share percentages far in excess of domestic insurers. The market share trends in Alabama in the 25 years since the passage of Alabama's current premium tax differential provide a strong inference that Alabama's



insurance market is more competitive with a differential premium tax than it would have been without a differential—there is a notable absence of any market signal that foreign insurers have suffered and, in the meantime, domestic insurers have managed to maintain large enough market visibility to add significantly to the strength of competition. Thus, the pro-competitive purpose of Alabama's premium tax differential appears to be well-served by the experience to date.

*State Purpose #3 and Its Effects*

*To extend the range of customer choice among alternative insurance companies.* The existence of healthy, viable domestic insurance companies gives the general public a wider range of both companies and policies to choose from in selecting the kinds of insurance coverage and insurance service which best suits their needs.

To the extent that a lower premium tax rate for domestic insurance companies is successful in encouraging the formation of new insurance companies domiciled within Alabama, it also succeeds in broadening the range and type of insurance companies among which insurance buyers can choose. Having more domestic companies in competition alongside foreign companies enhances buyer choices in a constructive and beneficial manner. With more domestic companies, and thus more alternative insurance policies and services, there is increased likelihood that the different and diverse needs of insurance policyholders will be satisfactorily met.

All policyholders and potential policyholders are not alike. Some buyers prefer limited coverage and lower premiums. Some buyers prefer broad coverage and are willing to pay higher premiums for it. Some buyers have needs for special types of policies. Some buyers are very interested in custom-tailored optional features, based on their situations and preferences. The number

of market segments and customer needs are myriad. A particular contribution of domestic insurance companies is their potential for understanding and catering to local needs and local situations; where desirable, they can specialize in policies and coverages to fit specific market needs and/or regulatory requirements. Foreign companies may have neither the flexibility nor the inclination to emphasize particular policies and services for limited market segments within a state or group of counties or a community. As a result, a combination foreign-domestic insurance industry may better meet statewide insurance needs than just a foreign industry alone.

In Alabama, the increased range and diversity of choice provided by the state's domestic insurance industry is apparent in at least two respects: (1) the variety in structure and make-up of Alabama's domestic insurance industry, (2) the difference in emphasis which domestic firms place on industrial-type insurance policies and (3) the difference in the mix of policies written by large foreign and domestic insurers. Information compiled from Alabama Department of Insurance records highlights the added variety in the types of companies found in Alabama's domestic industry:

As of 1960

| Class of Company | Number of Companies | |
|---|---|---|
| | Domestic | Foreign |
| Life | 54 | 220 |
| Property and Casualty | 18 | 357 |
| Mutual Aid | 18 | — |
| Fraternal | 10 | 14 |
| Title | 4 | 9 |
| Non-profit | 1 | 0 |



As of 1981

| Class of Company | Number of Companies | |
|---|---|---|
| | Domestic | Foreign |
| Life | 36 | 560 |
| Property and Casualty | 23 | 512 |
| Mutual Aid | 17 | — |
| Fraternal | 7 | 13 |
| Title | 2 | 19 |
| Non-profit | 1 | 0 |

For at least the past 21 years, Alabama's mutual aid and nonprofit firms offered buyers a type of firm not found among foreign firms; the number of domestic fraternal firms also added signicantly to the range of buyer choice in that category of firm (accounting for 10 out of a total of 24 fraternal firms in 1960 and 7 out of 20 fraternal firms in 1981). While the number of domestic life and property and casualty firms is small in comparison to the number of foreign firms, the value of the added choice they provide to insurance policyholders is demonstrated by the continued growth in the premiums written by domestic firms (shown in Thompson Exhibit 3).

The potential of domestic firms to enrich the variety and mix of insurance policies offered and to cater directly to special situations is well illustrated by the widespread popularity of industrial life policies in Alabama: [6]

[6] Industrial life insurance policies are issued for small amounts, usually less than $1,000, and the premiums are often paid weekly or monthly to an agent who calls at the policyholder's home.

| Year | Number of Industrial Life Policies | | |
|---|---|---|---|
| | Alabama | United States | Alabama as a Percent of U.S. Total |
| 1980 | 6,651,000 | 57,707,000 | 11.5% |
| 1975 | 6,892,999 | 69,715,000 | 9.9 |
| 1970 | 6,191,000 | 77,355,000 | 8.0 |
| 1965 | 6,039,000 | 89,416,000 | 6.8 |
| 1960 | 5,757,000 | 100,172,000 | 5.7 |
| 1955 | 5,312,000 | 111,869,000 | 4.7 |

Source: *Life Insurance Fact Book*, 1981, 1976, 1971, 1966, 1961, and 1956 issues.

In Alabama domestic companies have a major share of the industrial insurance market segment and are directly responsible for the increasing number of policy sales, even though the national trend is in the opposite direction. The popularity of industrial policies in Alabama is due largely to the prevalent use of burial insurance in Alabama. Domestic insurance companies which have been leaders in promoting burial insurance include Liberty Nation, Mutual Savings, Southern United, National Security, and Booker T. Washington; all five of these firms having long made burial policies a centerpiece in their policy offering. Evidence of the sharply differing emphasis of foreign and domestic life insurers as concerns the mix and variety of life insurance policies is shown below:



**Percentage Breakdown of Premiums Written By Policy Type, the Ten Largest Foreign and Domestic Life Insurance Companies in Alabama, 1981**

| | Percent of 1981 Life Premiums Written by Policy Type | | | |
|---|---|---|---|---|
| Foreign Life Co. | Ordinary | Credit | Group | Industrial |
| Prudential | 53.37% | 1.73% | 44.82% | 0.08% |
| Aetna | 19.42 | 0 | 80.57 | 0 |
| Metropolitan | not reported | | | |
| Equitable | 59.96 | 0 | 40.04 | 0 |
| New York Life | 88.67 | 0 | 11.33 | 0 |
| Provident | 47.65 | 0.00 | 52.35 | 0 |
| Independent | 38.10 | 0 | 0.15 | 61.75 |
| Travelers | 32.95 | 0.11 | 66.94 | 0 |
| John Hancock | not reported | | | |
| State Farm Life | 97.78 | 0.35 | 1.87 | 0 |
| 8-Firm Average | 61.23 | 0.43 | 31.94 | 6.40 |
| Domestic Life Co. | | | | |
| Liberty National | 66.75% | 0% | 3.20% | 30.06% |
| Protective Life | 26.14 | 17.41 | 56.46 | 0 |
| Mutual Savings | 23.58 | 3.50 | 0.40 | 72.52 |
| Fed. Guaranty | 93.72 | 3.18 | 3.10 | 0 |
| Life Ins. Co. (Ala) | 52.10 | 41.11 | 6.79 | 0 |
| So. United | 13.96 | 28.00 | 0 | 58.04 |
| Old Southern | 99.13 | 0 | 0.87 | 0 |
| Natl. Security | 23.43 | 1.97 | 0.42 | 74.18 |
| Loyal American | 49.87 | 24.03 | 26.10 | 0 |
| Employers Life | 47.14 | 12.38 | 40.48 | 0 |
| 10-Firm Average | 56.90 | 5.16 | 9.42 | 28.52 |

Source: Annual Statements filed with the Alabama Insurance Department for 1981, Direct Business in the State During 1981.

These percentage breakdowns illustrate the different customer-market emphasis of the large domestic and foreign insurers in Alabama.

*State Purpose #4 and Its Effects*

*To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies.* A lower premium tax for domestic insurance companies means that they have available a higher percentage of total premium receipts for use in growing and strengthening their overall business. For a new or relatively small domestic firm that is struggling to gain a market foothold and to expand the size of its policyholder base to the point of competitive viability, such a premium tax differential can be a significant help—in some cases, a 2 or 3 percent tax saving can be the difference between surviving and not surviving. A newly-formed domestic company can utilize its lower premium tax to (1) to get over the hurdles of an initial start-up period and (2) survive the rigors of becoming a large enough size to be efficient enough to compete. As is the case in many other industries, the insurance business is one where there are important economies associated with larger-scale operations—that is, unit operating costs tend to decline as the volume of business increases.[7] Hence, if a state is to be

[7] For authoritative studies on the nature and size of economics of scale in the insurance industry, see D. W. Colenutt, "Economies of Scale in the United Kingdom Life Assurance Industry," *Applied Economics*, Vol. 7 (1977), pp. 219-225; Neil A. Doherty, "The Measurement of Output and Economies of Scale in Property-Liability Insurance," *Journal of Risk and Insurance*, Vol. 48 (1981), pp. 390-402; J. H. Hammond, E. R. Melander, and N. Shilling, "Economies of Scale in the Property and Liability Insurance Industry," *Journal of Risk and Insurance*, Vol. 41 (1974), pp. 181-191; David B. Houston and Richard M. Simon, "Economies of Scale in Financial Institutions: A Study in Life Insurance," *Econometrica*, Vol. 38 (1970), pp. 856-864; Peter Praetz, "Returns to Scale in the U.S. Life Insurance Industry," *Journal of Risk and Insurance*, Vol. 47 (1980), pp. 525-533; and S. Travis Pritchett, "Operating Expenses of Life Insurers: 1961-70: Implications for Economics of Size," *Journal of Risk and Insurance*, Vol. 43 (1976), pp. 157-165. For further elaboration on this point, see the accompanying study by Dr. George Overstreet.



serious about trying to encourage and support the formation of a viable and competitively vigorous domestic insurance industry, it has to invest in a lower premium tax for domestic companies as a means of helping small, domestic companies reach a sufficiently large size where their unit operating costs are on a par with those of large, national companies (whose scale of operations provides steady access to the various advantages of large size). A lower premium tax for domestic companies thus gives them a source of extra competitive stamina—hopefully enough to allow them, over time, to capture a sufficiently large volume of business to compete on an equal footing with larger, foreign companies which, without such a tax, might have a decisive competitive edge.

The wide gap between the sizes of foreign companies and domestic companies in Alabama can be seen in the following lists of the 5 largest foreign and domestic companies (compiled from the 1980 Alabama Insurance Report):

The 5 Largest Foreign and Domestic Life Insurance Companies in Alabama (ranked by assets)

| | 1979 Assets | 1979 Net Premiums Written |
|---|---|---|
| **FOREIGN** | | |
| 1. Prudential Ins. Co. of America | $54,734,096,000 | $7,999,690,000 |
| 2. Metropolitan Life Ins. Co. | 44,967,552,000 | 5,934,722,000 |
| 3. Equitable Life Ass. Soc. of U.S. | 30,839,216,000 | 4,575,469,000 |
| 4. Aetna Life Ins. Co. | 18,548,768,000 | 4,729,186,000 |
| 5. New York Life Ins. Co. | 18,479,216,000 | 2,598,658,000 |
| **DOMESTIC** | | |
| 1. Liberty National Life Ins. Co. | 1,525,994,000 | 271,823,000 |
| 2. Protective Life Ins. Co. | 358,990,000 | 106,828,000 |
| 3. Mutual Savings Life Ins. Co. | 153,511,000 | 38,099,000 |
| 4. Southern Life and Health Ins. Co. | 152,546,000 | 27,978,000 |
| 5. Empire General Life Ins. Co. | 86,558,000 | 20,601,000 |

At the beginning of 1980, the largest domestic life firm in Alabama was less than 3 percent the size of the largest foreign firm in terms of assets; the fifth largest firm in Alabama had assets less than 0.5 percent as big as the fifth largest foreign firm. The 1980 Alabama Insurance Report indicated 34 domestic life insurance firms (including fraternals and mutual aids) in Alabama with 1979 assets under $10 million—or a miniscule 0.02 percent or less the assets of the largest foreign firm. Two ratios usefully illustrate the magnitude of the size differentials between foreign and domestic firms in Alabama: the 1979 assets of the largest foreign firm were (1) 33 times the assets of the largest domestic firm and (2) more than 30,000 times the assets of each of those 34 Alabama life insurance firms with assets under $10 million.

The size differential between foreign and domestic property and casualty firms is likewise substantial. According to the *1980 Alabama Insurance Report*, the 1979 assets of the largest foreign property and casualty insurer were 72 times greater than the 1979 assets of Alabama's largest domestic property and casualty insurer; in terms of net premiums written in 1979, the size differential between the largest foreign and domestic firms was 73:1. Also, in 1979, 19 of Alabama's 21 domestic propety and casualty firms had assets under $31 million, making the largest foreign firm *at least* 381 times larger than 19 of the state's 21 firms. As many as 296 of the 483 foreign property and casualty companies doing business in Alabama in 1979 had total assets larger than 19 of the state's 21 P & C insurers.

The size differentials between foreign and domestic firms in Alabama are plainly of a magnitude that allow large foreign firms to have an economy-of-scale advantage over small domestic firms. It is perfectly reasonable to presume that a lower premium tax for domestic firms helps lessen the competitive cost disadvantage of domestic insurers, thus enhancing their chances for survival in the market place. The public benefits of such an outcome are a more contestable insurance marketplace in Alabama and a richer variety of types of insurers among which consumers can choose and compare.



*State Purpose #5 and Its Effects*

*To reduce the barriers to entry into the insurance industry.* To the extent that a lower premium tax makes it more economically feasible for fledgling domestic insurers to survive and maybe even prosper (if their policies are well conceived and astutely marketed) in competition with foreign insurers, then the barriers to entry into the insurance industry in Alabama are effectively reduced. The Alabama legislature's attempt to mitigate the competitive advantage of large, well-known foreign companies over fledgling domestic firms is thus a procompetitive policy for the simple and obvious reason that reduced barriers to entry makes the entry of new domestic firms more probable and more feasible.

As cited earlier, the available statistics compiled from Alabama Department of Insurance records confirm that significant numbers of domestic firms have been formed in Alabama. Since 1960 the number of new domestic insurance companies (all type) licensed to do business in Alabama include:

| | |
|---|---|
| 49 | Life insurance companies |
| 14 | Property and casualty companies |
| 3 | Title companies |
| 17 | Mutual aid companies |
| 83 | Total |

This 83-company total for the 21-year period 1960-1981 averages out to an entry of 4 new domestic companies per year.

*State Purpose #6 and Its Effects*

*To encourage more insurance to be sold in Alabama, with the result that more Alabama citizens gain access to the many benefits that adequate insurance protection provides.* Ultimately, of course, the value of promoting a healthy, growing domestic insurance industry and of creating lively competition between foreign and domestic companies has to do with the benefits that the public and the state gain from such conditions. One such larger public benefit (in addition to the added jobs and payrolls, cited earlier) is greater access to and use of insurance. The merits of adequate insurance protection are generally accepted and are not really at issue here.

What is at issue, however, is whether and to what extent a lower premium tax for domestic insurers makes a contribution to enhancing the total amount of insurance coverage in Alabama. No one can say what would have happened in the absence of Alabama's lower premium tax for domestic firms, but there is evidence on what has happened with it:

- ** From 1955 through 1980 (a period which Alabama has maintained a lower premium tax for domestic firms), the total amount of life insurance in force in Alabama has grown at an average annual compound rate of 10.2% versus a 9.4% rate for the U.S. as a whole.[9]

- ** During the same period the number of life insurance policies in force in Alabama increased at

[9] The *Life Insurance Fact Book* (1956 and 1981 issues) reported that the total amount of life insurance in force in Alabama was $4,895,000,000 in 1955 and $55,483,000,000 in 1980; in the U.S. the figures were $372,332,000,000 in 1955 and $3,541,038,000,000 in 1981.



an average annual rate of 2.28% versus just a 1.90% rate for the U.S. as a whole.[9]

- ** During the 1966-1980 period, the amount of direct premiums written by property and casualty insurance firms grew at an average annual compound rate of 13.1% in Alabama versus a 12.2% rate for the U.S. as a whole.[10] (Data on the dollar amount of property and casualty coverage is not available because of the complexity in defining and calculating the aggregate amount of coverages in all the different types of property and casualty policies. However, the premiums paid on such policies are a reasonable index for comparing the growth of property and casualty coverage between Alabama and the U.S.)

These figures are consistent with the reasonable expectation and belief that a lower premium tax for domestic companies can and does have a positive impact on the total amount of insurance coverage in Alabama.[11] Cer-

[9] The *Life Insurance Fact Book* (1955 and 1982 issues) reported a total of 7,016,000 life insurance policies in force in Alabama in 1955 and a total of 12,331,000 in 1980; for the U.S. as a whole, the figures were a total of 251,080,000 in 1955 and 401,626,000 in 1980.

[10] *Insurance Facts* (1967 and 1981-82 editions) reported a total of $212.8 million in direct premiums written in Alabama in 1966 versus a $1,194.7 million total in 1980; the U.S. figures were $19,412.0 million in 1966 and $96,709.9 million in 1980.

[11] While it *might* be claimed that the growth rate differentials between Alabama and the U.S. *could* be attributable to nothing more than a faster rate of population growth in Alabama relative to the U.S., such is unequivocally not the case. Between 1955 and 1980 the U.S. population grew at an average annual compound rate of 1.3% versus a 0.39% rate for Alabama; during the period 1965-1980 the population growth rates were 1.15% for the U.S. versus 0.89% for Alabama. Consequently, the fact that total insurance coverages in Alabama have grown faster than for the U.S. as a whole are all the more impressive, given Alabama's slower rate of population (and also its much lower income base—to be discussed below).

tainly, this result ought to be one of the logical outcomes of a lively and more contestable insurance marketplace in Alabama. The modest evidence available on this point indicates that the logical result is, in fact, being obtained.

*State Purpose #7 and Its Effects*

*To promote a greater level of average insurance coverage per family in Alabama.* A principal benefit of vigorous competition is greater attractiveness and use of the product by the general public—in the case here, a greater average insurance coverage per family.[10] The association between Alabama's enactment of a differential premium tax and the growth in the average amount of life insurance in force per Alabama family is strong and impressive, as shown in detail in Thompson Exhibit 4 and as highlighted below:

| | Average Amount of Insurance in Force per Family | | |
|---|---|---|---|
| Year | Alabama | U.S. | Alabama as a % of U.S. Average |
| 1955 | $ 5,600 | $ 6,900 | 81.2% |
| 1965 | 13,700 | 14,700 | 93.2 |
| 1975 | 27,600 | 28,100 | 98.2 |
| 1980 | 39,500 | 41,500 | 95.2 |

Between 1955 and 1980 the average amount of life insurance in force per family rose at an average annual compound rate of 8.1% in Alabama, compared to a rate of 7.4% for the U.S. An especially telling statistic is that in 1980 Alabama ranked 29th among the 50 states in

[10] The benefits of vigorous competition are well-chronicled by economists; competition is what drives sellers to be efficient and to tailor their product offerings to the needs and pocketbooks of consumers. For a thorough treatment of this point, see Arthur A. Thompson, *Economics of the Firm: Theory and Practice*, Third Edition (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1981), especially Chapters 10-14 and Chapter 16.



average coverage per family and 48th in per capita disposable income.

On a per capita basis, a similar picture emerges and, moreover, the pattern in Alabama prevails in 23 other states with differential premium tax provisions (for more detailed data see Thompson Exhibit 5):

| | Life Insurance in Force per Capita | | | | |
|---|---|---|---|---|---|
| Year | Alabama | 24 States with Differential Premium Taxes | U.S. | Alabama as a % of U.S. | 24 States as a % of U.S. |
| 1955 | $ 1,605 | $ 2,080 | $ 2,266 | 70.8% | 91.8% |
| 1965 | 4,028 | 4,428 | 4,655 | 86.5 | 95.1 |
| 1975 | 9,294 | 9,692 | 9,930 | 93.6 | 97.6 |
| 1980 | 14,230 | 15,316 | 15,588 | 91.3 | 98.3 |

Between 1955 and 1980 per capita life insurance in force has increased at a 9.1% average annual rate in Alabama versus an 8.0% average rate in the U.S. While *some* of this growth rate differential can be attributed to slightly faster per capita disposable income growth in Alabama (7.2% in Alabama versus 6.5% for the U.S.), all of it cannot: Alabama's per capita life insurance in force in 1980 was 91.3% of the overall U.S. average whereas per capita disposable personal income in Alabama was only 79.8% of the 1980 U.S. average. The fact is that Alabama citizens have chosen to allocate a substantially greater percentage of their disposable income for life insurance than has the average U.S. citizen:

As shown in detail in Thompson Exhibit 6, this pattern is not unique to Alabama; it exists in Hawaii, Illinois, Indiana, Kansas, Nebraska, North Carolina, Ohio, South Dakota, and Tennessee, each of which has a lower premium tax for domestic companies. Throughout the 1973-1980 period, citizens in states with a premium tax differential for domestic life firms have, on average, spent a higher percent of total disposable income for life insurance premiums than has been the case in other states.

In Alabama there simply can be little room to doubt that life insurance coverage is above what might reasonably be anticipated on basis of income levels alone. Given that domestic life insurance firms in Alabama have been able to capture and maintain a 25 to 40 percent share of the life insurance business in Alabama and given the competitive position of Alabama's domestic life insurance industry, there is solid and legitimate reason to believe that the stimulation of a lower premium tax for domestic firms is serving its intended purpose of helping to increase the average level of life insurance coverage in Alabama.

Data on property and casualty coverages in Alabama, while less comprehensive, still points to a similar conclusion. As shown in Thompson Exhibit 7:

- In 1970, Alabamians paid premiums for automobile and homeowners' insurance coverages equal to 2.36% of total personal disposable income in Alabama, an income allocation equal to 94.4% of the 1970 national average of 2.50%.
- In 1980 Alabamians paid premiums for automobile and homeowners' insurance coverages equal to 2.66% of total personal disposable income in Alabama, an income allocation equal to 96.7% of the 1980 national average of 2.75% and up from the 1970 value.
- Between 1970 and 1980 direct premiums written for auto and homeowners' insurance in Alabama increased at an average annual compound rate of 12.0%, as compared to the national average of 11.06%.

In summary, not only is there a reasonable expectation that a lower premium tax on domestic insurance companies will serve to stimulate a greater average level of insurance coverage per family, the statistics bear out its



occurrence, particularly in the case of life insurance coverage.

*State Purpose #4 and Its Effects*

*To enhance the use of insurance by Alabama families.* The statistical evidence previously cited on total life insurance in force in Alabama and on average insurance coverage in Alabama confirms to a large extent that insurance is purchased more heavily by Alabama citizens than might be expected given the low income base in the state. The propensity of Alabamians to purchase some form of life insurance is further indicated by the reported number of policies in force in Alabama:

| | Number of Life Insurance Policies in Force in Alabama | | |
|---|---|---|---|
| Year | Total | Per Capita | Per Capita Average in United States |
| 1980 | 12,531,000 | 3.16 | 1.77 |
| 1975 | 11,789,000 | 3.20 | 1.76 |
| 1970 | 10,431,000 | 3.02 | 1.74 |
| 1965 | 9,452,000 | 2.75 | 1.65 |
| 1960 | 8,200,000 | 2.50 | 1.57 |

Source: Number of policies in force from *Life Insurance Fact Book* and population figures from U.S. Bureau of the Census and Bureau of Economic Analysis.

Additional evidence on the use of life insurance in Alabama is shown in Thompson Exhibit 8. In 1955 when Alabama's current differential premium tax law took effect, the per capita amount of life insurance in force in Alabama was $1,605, an amount equal to 70.8% of the U.S. average of $2,266 per capita. In 1980, Alabama's per capita level of life insurance coverage was $14,230, almost 9 times the 1955 level and equal to 91.3% of the 1980 U.S. average of $15,588.

Further inspection of Exhibit 8 reveals that the Alabama experience is representative of the experience in 23 other states with differential premium taxes. Since 1955 the per capita level of life insurance coverage in 24 states with differential premium taxes has been climbing as a percentage of the U.S. average:

| Year | Life Insurance in Force per Capita: 24 States with Differential Premium Taxes | Life Insurance in Force per Capita: U.S. | 24 States as a % of U.S. Average |
|---|---|---|---|
| 1955 | $ 2,060 | $ 2,264 | 91.0% |
| 1960 | 3,001 | 3,259 | 92.1 |
| 1965 | 4,428 | 4,655 | 95.1 |
| 1970 | 6,594 | 6,883 | 95.8 |
| 1975 | 9,672 | 9,930 | 97.4 |
| 1980 | 13,316 | 13,568 | 98.1 |

Finally, as displayed in Thompson Exhibit 9, the per capita amount of life insurance in force as a percentage of per capita disposable income is impressively high in Alabama relative to the U.S. average. In 1955 when Alabama's current differential premium tax was enacted the per capita amount of life insurance in force in Alabama was 142.4% of per capita disposable income, as compared to the U. S. average of 126.4%. In 1980, the Alabama percentage was 224.1% versus the U.S. average of 195.8% The Alabama-U.S. differential was thus significantly wider in 1980 than in 1955 and, moreover, Alabama's 1980 percentage of 224.1% was significantly greater than the 1955 figure of 142.4%. Furthermore, as can be seen from an inspection of the last 3 lines in Exhibit 9, the 24-state average percentage ratio (per capita insurance in force to per capita personal disposable income) has risen from being *below* the U.S. average in 1955 (131.8% vs. 126.4%) to *above* the U.S. average in 1980 (199.7% vs. 195.8%).



There is, therefore, impressive statistical evidence pointing to the achievement of the state purpose of enhancing the use of life insurance by Alabama families. Given that Alabama's above-average growth in per capita life insurance in force is, on average, being replicated in 23 other states with differential premium taxes, there is credible basis for the conclusion that the differential premium tax is, in fact, helpful in stimulating increased use of insurance through (1) encouraging the formation of a competitively healthy domestic industry and (2) making the state's insurance marketplace more contestable.

*State Purpose #9 and Its Effects*

***To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, accidents, and other such calamities as may render them debilitating financial losses.***

As previously discussed, using a differential premium tax policy to create an active, healthy domestic property and casualty insurance industry has two important ripple effects:

1. It enhances competition, especially as concerns coverage features, service to policyholders, and premium rates, and

2. Greater competition tends to promote greater use of property and casualty insurance and greater customer satisfaction with such policy purchases.

To the extent that Alabama's differential premium tax policy makes Alabama's property and casualty insurance market more contestable, then the more likely it becomes that Alabama families and Alabama businesses will be drawn to the practice of insuring themselves adequately against insurable types of calamities. The limited available evidence suggests this outcome is occurring. As shown in Thompson Exhibit 10, the direct written pre-

miums for property and casualty ("P & C") insurance in Alabama have risen from $212.8 million in 1966 to $1,194.7 million in 1980, an average annual growth rate of 13.1% as compared to just a 12.2% growth rate for the U.S. as a whole.[13] In 24 states with a differential premium tax policy, P & C premiums increased at a 12.6% average annual rate during the 1966-1980 period and the percentage of all P & C premiums written in these states jumped over 2 percentage points—from 42.4% in 1966 to 44.8% in 1980.

The increased degree of P & C coverages implied by the above-average increases in P & C premiums suggests realization of the intended state purpose. Moreover, the value of this added protection and coverage transcends just policyholders. The general public benefits from the lessened burden that calamities might otherwise impose on state and local governments and thus upon Alabama taxpayers.

*State Purpose #10 and Its Effects*

*To promote greater availability of insurance of all types in rural and sparsely populated sections of Alabama.* The most rural counties of Alabama constitute geographic market segments which tend to be less attractive to large, foreign companies because of the limited potential payoff of trying to serve a relatively small population in outlying locations. These relatively neglected geographic

[13] As documented in footnote 11, this growth rate differential is *not* accounted for by faster population growth in Alabama. It could, however, be partially attributable to Alabama's slightly faster growth in per capita disposable personal income (7.2% in Alabama versus 6.5% in the U.S., during the 1965-1980 period), since consumer purchase of property and casualty insurance is probably income elastic up to some income plateau. Even so, the figures for direct premiums written include both business and consumer premiums for P & C policies; business use of P & C insurance, of course, is not a direct function of consumer income levels.



areas may well be attractive to fledgling domestic companies if concentrating on such "vacant niches" can be made economically feasible. A lower premium tax rate for domestic companies is one means whereby a state with a significant rural populace can encourage the extension of an important item like insurance to all areas and communities and do so in ways which enhance the associated package of policies and services offered.

Evidence of the sharply different emphasis of domestic and foreign insurers in Alabama's rural-urban areas comes from a study of the location of the agents of the ten largest foreign and domestic insurers of Alabama.[14] According to 1982 records of the Alabama Department of Insurance, the ten largest foreign life insurers had 3,761 agents in Alabama as of January 1, 1982, whereas the ten largest domestic insurers had 3,806 licensed agents (see Thompson Exhibit 11). In Alabama's four most urbanized and heavily populated counties (Jefferson, Madison, Mobile, and Montgomery counties), the ten biggest *foreign* life insurers had 2,0[illegible] licensed agents as of January 1982 versus a total of 1,180 licensed agents for the ten largest *domestic* life insurers. A total of 69.5% of the 3,761 licensed agents of the ten *foreign* life companies were in Alabama's 10 most urbanized areas, as compared to only 49.0% of the agents of the ten *domestic* life firms.[15] In contrast, in Alabama's 15 poorest

[14] Computerized records of the Alabama Department of Insurance were studied to determine the number of agents relicensed as of January 1, 1982, for each of the ten largest domestic and foreign life insurers (based on premiums written). The ten largest foreign and domestic insurers are the same as those listed in Thompson Exhibit 12.

[15] The counties included here are Calhoun, Colbert-Lauderdale (the Tri-Cities area), Etowah, Houston, Jefferson, Madison, Mobile, Montgomery, Morgan, and Tuscaloosa. The classification of the counties into rural and urban follows that in Arthur A. Thompson, "The Five Economies of Alabama: Patterns of Urban-Rural Development," Monograph Series No. 3, The University of Alabama, Graduate School of Business, 1974.

counties (1975 per capita incomes below $3,500—as compared to the Alabama average of $4,648 and the U.S. averge of $5,903), there were 257 licensed agents for the 10 *domestic* life firms versus 107 agents for the 10 *foreign* life companies studied. The number of agents for the 10 *domestic* life firms outnumbered the agents of the 10 *foreign* life firms in 54 of Alabama's 65 counties. Excluding the counties in the ten urbanized areas cited earlier, the *domestic* life agents outnumbered the *foreign* life agents by 1,943 to 1,138—a statistic which reveals clearly the different rural-urban emphasis of domestic and foreign life insurers (given the nearly equal number of agents in the two groups of firms studied—3,806 *domestic* firm agents versus 3,761 *foreign* firm agents).

A similar picture emerges in the case of the county distribution of property and casualty agents.[16] The study showed a total of 3,093 *domestic* P & C agents versus 3,826 *foreign* P & C agents. Again, by far the heaviest concentration of *foreign* P & C agents was in Alabama's four most populous counties—54.0% of the total agent representation of *foreign* P & C insurers was in Jeffer-

[16] Some caution must be exercised in the interpretations placed on the statistics for licensed agents in the P & C area. This is because of the practice of "independent insurance agents" to represent several P & C companies rather than just one. In the case of life insurance, an agent usually sells policies for only one life insurance company, but in the property and casualty area, there are relatively large numbers of agents who offer the policies of several P & C firms (either foreign or domestic or both). Thus, in Thompson Exhibit 11 an agent who handles the P & C policies of 10 different P & C insurers would be counted 10 times rather than once, because in a real sense he serves simultaneously as agent for all ten firms. In the discussion of P & C agent coverage which follows, the word "agent" and the phrase "number of agents" should be interpreted in a way as to allow a single person to act as an agent for several companies. The differences between the numbers shown for foreign and domestic P & C insurers thus reflects not the number of persons but rather a crude index of hte relative degree of market representation between foreign and domestic P& C insurers.



son, Madison, Mobile, and Montgomery counties versus only 32.9% of the agent representation of the *domestic* firms. Given the fact that the ten largest *domestic* P & C insurers wrote only 41.8% as much in premiums as did the ten largest *foreign* P & C insurers in 1981, it is impressive that the 10 *domestic* P & C insurers were more heavily represented than were the 10 *foreign* insurers in 47 of Alabama's 65 counties.[17] In the 15 poorest counties, *domestic* P & C insurers were represented more heavily than *foreign* P & C insurers by a margin of 205 to 124.

The comparative county-by-county distribution of agents between the largest domestic and foreign insurers indicates that there is, in fact, a propensity for domestic insurers to pay *relatively more* attention to the rural and the lower income segments of Alabama's insurance market than do the major foreign insurers. The potential public service contribution of domestic insurers in expanding the insurance offerings and services to these "vacant market niches" and in making the competition in these niches much more vigorous than it might otherwise be appears, therefore, in the process of being realized. Alabama's experience with this state purpose comes out highly favorable.

*State Purpose #11 and Its Effects*

*To promote a higher rate of economic development in the state of Alabama.* Alabama's premium tax legislation contains a significant feature not found in the laws of many other states with differential premium tax rates. Alabama law provides that the premium tax rate paid by foreign insurance companies shall be reduced by one-tenth of one percent (0.1%) for each 1 percent of their admitted assets invested in Alabama. This provision is plainly intended as an incentive for foreign companies to increase their Alabama investments above what they

[17] Comparative statistics on premiums written is presented in Thompson Exhibit 12.

might otherwise elect to invest in Alabama. It is especially important to note that the Alabama legislature established investment incentive provisions that can *realistically* and *rationally* be expected to produce incremental investments in Alabama; the Alabama incentive is summarized below:

| Premium Tax Rate | | |
|---|---|---|
| Life Policies (except annuities) | All Other Policies | Percentage of Admitted Assets Invested in Alabama |
| 3.0% | 4.0% | Less than 1% |
| 2.9 | 3.9 | 1.0-1.99% |
| 2.8 | 3.8 | 2.0-2.99% |
| 2.7 | 3.7 | 3.0-3.99% |
| 2.6 | 3.6 | 4.0-4.99% |
| 2.5 | 3.5 | 5.0-5.99% |
| 2.4 | 3.4 | 6.0-6.99% |
| 2.3 | 3.3 | 7.0-7.99% |
| 2.2 | 3.2 | 8.0-8.99% |
| 2.1 | 3.1 | 9.0-9.99% |
| 2.0 | 3.0 | 10.0% or more |

Other states have provisions which call for premium rate reductions provided certain percentages of assets are invested in the state, but the required percentages have often been set so high as to decrease the likelihood that all but a very few foreign firms from gaining any kind of tax reduction; for example, the 1977 Council of State Governments' survey indicated the following:

> in Georgia—the premium tax rate on a foreign company is reduced from 2.25% to 1.25% if 25% of total assets are invested in Georgia; and if 75% of total company assets are invested in Georgia, then the premium tax rate is reduced further to 0.5%.
>
> in West Virginia—the premium tax rate may be reduced from 3% to 2% if 25% of admitted assets are invested in West Virginia securities.



> in Louisiana—the premium tax on foreign companies may be reduced by ⅔ the amount of tax otherwise payable if 1/6 or more of stated assets are invested in certain specified Louisiana properties.

Because Alabama's required investment percentages are more attractive than those of Georgia, West Virginia, and Louisiana, Alabama's law is likely to be more effective in securing added foreign insurance company investments in Alabama. The "real" incentive characteristic of the Alabama statute confirms the "legitimacy" and seriousness of the Alabama Legislature's intent to attract more investment capital to Alabama by incorporating a comparatively low admitted asset percentage to qualify for a premium tax reduction.

Records of the Alabama Department of Insurance confirm the attractiveness of Alabama's admitted asset percentage requirements. Substantial numbers of foreign insurance companies have qualified for premium tax reductions in Alabama:

| | Number of Foreign Life Insurers Qualifying for Premium Tax Reductions | | |
|---|---|---|---|
| Premium Tax Rate | 1964[a] | 1979[b] | 1980[b] |
| 2.9% | 30 | 58 | 52 |
| 2.8 | 12 | 20 | 21 |
| 2.7 | 6 | 9 | 11 |
| 2.6 | 8 | 4 | 6 |
| 2.5 | 3 | 4 | 4 |
| 2.4 | 0 | 3 | 2 |
| 2.2 | 3 | 1 | 3 |
| 2.3 | 2 | 2 | 1 |
| 2.1 | 0 | 0 | 0 |
| 2.0 | 12 | 7 | 5 |
| | 76 | 108 | 105 |

[a] As reported in Paul Alyea, *Taxation of Life Insurance Companies in Alabama* (University, Alabama 1966), p. 65.

[b] As compiled by Alabama Department of Insurance, January 1982, from Annual Statements filed by foreign life insurers doing business in Alabama.

| Premium Tax Rate | Number of Foreign Property and Casualty Insurers Qualifying for Premium Tax Reductions | |
|---|---|---|
| | 1979* | 1980* |
| 3.9% | 48 | 55 |
| 3.8 | 29 | 24 |
| 3.7 | 9 | 11 |
| 3.6 | 7 | 5 |
| 3.5 | 4 | 6 |
| 3.4 | 5 | 1 |
| 3.3 | 1 | 4 |
| 3.2 | 1 | 3 |
| 3.1 | 2 | 1 |
| 3.0 | 8 | 6 |
| | 114 | 116 |

*As compiled by Alabama Department of Insurance, January 1982, from Annual Statements filed by foreign companies doing business in Alabama.

With some 221 foreign companies (out of over 1,000 foreign companies doing business in Alabama) having enough admitted assets in Alabama to take advantage of Alabama's investment incentive provisions as of 1980, there is reason for Alabama legislators to believe that foreign company investment in Alabama tends to be higher than it might otherwise be without such a provision and that the legislative intent of the investment incentive provision is being served.[18] Certainly, the objective of using premium tax rate incentives to attract added amounts of investment capital to Alabama is a legitimate state purpose having useful and potentially important economic benefits to the general public. And, certainly, given Alabama's long-standing position as a

[18] It is, of course, not possible to know what foreign insurance company investments in Alabama would be in the absence of Alabama's incentive provisions.



low-income, relatively undeveloped state, it makes sense for the Alabama Legislature to utilize premium tax rate incentives as part of a package of broad-ranging incentives to attract industry and investment capital to the state.[19]

*State Purpose #12 and Its Effects*

*To promote the growth and development of a domestic insurance industry, thereby realizing the general economic and public benefit that derives from the fact that domestic insurance companies typically invest a far higher percentage of their admitted assets in Alabama than do foreign companies.* Alabama's efforts to achieve economic parity with other, more economically-advanced states is materially enhanced by differential premium taxation because of the general practice of domestic insurance companies to direct significantly higher percentages of their investment capital to in-state projects. Domestic insurance companies are therefore a very important source of capital for financing projects that benefit the citizens of Alabama and that contribute to a faster rate of economic growth within the state.

That this is so is readily documented. Thompson Exhibit 12 presents a comparison of the percentages of admitted assets invested in Alabama as between foreign and domestic insurers. The top ten foreign life insurers (based on premiums written in Alabama) had an average of 1.19% of their admitted assets invested in Alabama in 1981, as compared to an average of 34.66% for

[19] Alabama's use of industrial revenue bond financing and its industrial training programs, for example, have long been key features of an aggressive, state-financed attempt to recruit new industry to Alabama. For documentation of Alabama's efforts in the use of industrial development bond financing, see Arthur A. Thompson, *Industrial Development Bond Financing: Business and Community Experiences and Opinions* (University, Alabama: Alabama Business Research Council, 1970).

the ten largest domestic life insurers. Two of the top ten foreign life insurers claimed no Alabama investments in 1981. A wide differential also existed between foreign and domestic P & C insurers. The ten largest property and casualty insurers reported an average of 2.07% of their total investments as being in Alabama in 1981 versus an average of 27.20% for the eight largest domestic P & C insurers. Three of the ten largest P & C insurers claimed zero Alabama investments in 1981. Fourteen of the 20 largest foreign insurers in Alabama in 1981 claimed a percentage of admitted assets in Alabama below their percentage of premiums written in Alabama.

The propensity of domestic insurers to select a much higher percentage of Alabama investments for their investment portfolios as compared to foreign companies argues for a policy which favors encouraging the growth and development of a domestic insurance industry. This is especially true in a less-developed state like Alabama where there is a critical need for investment capital to support a statewide program of accelerated economic development. The State's long-standing rank as 48th (in some years 49th) in per capita income is a potent legislative reason for investment incentive provisions for insurance industry taxation, and such a policy is fully consistent with the myriad of tax-related and other inducements Alabama offers to prospective new industry.

*State Purpose #13 and Its Effects*

*To lessen the adverse impact which the financial activities and investment policies of foreign insurance companies have on the economy of Alabama.* Many foreign insurance companies tend to collect a larger percent of their insurance premiums from Alabama policyholders than they in turn invest in Alabama. To the extent that a disproportionate share of the premiums collected in Alabama are channeled to investments and banks outside of



Alabama, the financial activities of foreign insurance companies have potential for adversely impacting capital availability within the State—much needed funds tend to be withdrawn from the State's economy at the very time when such funds are desperately needed to help boost economic activity within the State. In contrast, not only do domestic insurance companies, on average, reinvest a far higher proportion of their admitted assets in Alabama than do foreign companies but they also deposit a far higher proportion of their cash in Alabama banks than do foreign companies. One of the purposes of differential premium taxation in Alabama is thus to assume an active stance in counteracting any propensity on the part of foreign insurers to underinvest in Alabama projects and to be a drain on capital availability. The intended result is an improved flow of capital into Alabama's underdeveloped economy. Achieving a higher degree of economic parity with the rest of the states in the United States has been a top priority of the excutive and legislative branches of Alabama's state government for at least two decades.

Evidence concerning the adverse financial impact of foreign insurance company activities on the Alabama economy is presented in Thompson Exhibits 13 and 14. Exhibit 13 contains a comparison of the bank deposits of the largest foreign and domestic insurers in Alabama as of December 31, 1981. The ten largest *foreign* life insurers in Alabama reported a total of just $741,437 in Alabama bank deposits at the end of 1981, a miniscule 0.1% of their total bank deposits of $569,349,478. The ten largest *foreign* property and casualty insurers in Alabama reported a total of $595,569 in Alabama bank deposits at the end of 1981, equal to 0.2% of their total reported bank deposits of $256,628,315. In sharp contrast, Alabama's ten largest *domestic* life insurers reported $13,519,662 in Alabama bank deposits (75.7% of their total $17,852,080 in bank deposits) and the State's

ten largest *domestic* P & C insurers reported Alabama bank deposits of $9,662,309—equal to 98.2% of their total bank deposits of $9,844,280.

To illustrate the significance of these wide differentials in the Alabama bank deposits of foreign and domestic insurers, consider the following benchmark comparisons of the ten largest foreign and domestic insurers in the life and P & C categories:

| | Combined Premiums Written in Alabama, 1981[a] | Combined Bank Deposits in Alabama, 12/31/81[b] |
|---|---|---|
| **Ten Largest Foreign Insurers** | | |
| Life | $348,104,4445 | $ 741,437 |
| P & C | 404,415,813 | 595,549 |
| **Ten Largest Domestic Insurers** | | |
| Life | $278,054,932 | $13,519,642 |
| P & C | 168,961,635 | 9,662,309 |

[a] As shown in Thompson Exhibit 12.

[b] As shown in Thompson Exhibit 13.

Obviously foreign insurers do not utilize Alabama's banking system to the same degree as tc domestic insurers—a characteristic which tends to drain financial capital from the state. The size of insurance company bank deposits in Alabama, is, of course, of importance to the state's economy because such deposits are a source of loanable funds and make bank credit more available to Alabama businesses and Alabama citizens.

An illustration of how the investment activities of foreign insurers can work to the detriment of the state's economy can be seen from the statistics in Thompson Exhibit 14.[20] In 1981 the largest foreign life insurers in

[20] Because the Alabama Department of Insurance retains the Annual Statements filings of foreign insurers for only two years, it



Alabama increased their assets by an average of 60.7% of total premiums written; had these firms increased their investments in Alabama by the same 60.7% of premiums written in Alabama, the capital inflow to the state would have totaled $158,100,000. The actual increase was only $38,640,000, resulting in a diversion of $119,460,000 premium income obtained in Alabama to capital investments *outside* Alabama. Similarly, the largest foreign P & C insurers diverted an estimated $32,308,000 in premium income obtained in Alabama to investments elsewhere. The total shortfall in expected capital inflows to Alabama for these 15 firms was an estimated $152,768,000 in 1981. Moreover, two of the large foreign life insurers, Aetna and Equitable, actually reduced their Alabama admitted assets between 1980 and 1981, despite showing sizable increases in premium income:

| | Aetna | Equitable |
|---|---|---|
| 1. Admitted assets in Alabama | | |
| 1981 | $280,522,532 | $332,438,776 |
| 1980 | 281,297,952 | 368,878,924 |
| Net Change | $ (775,420) | $(36,440,148) |
| 2. Premiums written in Alabama | | |
| 1981 | $ 67,481,920 | $ 39,033,746 |
| 1980 | 63,326,331 | 37,140,245 |
| Net change, 1980-1981 | $ 4,155,589 | $ 1,893,491 |

Source: Annual Statements for 1980 and 1981 filed with Alabama Department of Insurance.

These statistics are cited in order to pinpoint why and how the investment and banking policies of foreign insurers can work to the disadvantage of Alabama's econ-

was not feasible to extend the period of analysis backward and examine long-term trends in the Alabama-related investments of the major foreign insurers.

*omy; they are not intended to imply that large foreign insurers with national scope and market coverage can or ought to allocate the same large proportion of their investments to Alabama as do domestic insurers. The investment priority of foreign insurers is, understandably, to try to earn as high a risk-adjusted return for the company's stockholders as is prudent—whether this be in Alabama investments or in investment opportunities elsewhere. But, since the investment decisions of these foreign companies can, however unintentionally, create a major drain of capital from the state, it is reasonable and logical for a state government to institute legislative action to lessen the potential for significant capital outflows from the operations of foreign insurers. This can be done in two ways:*

1. *Heavier taxation of foreign companies (to recoup some of the funds for state purposes.)*
2. *Providing incentives for foreign insurers to invest greater amounts of their assets in Alabama via premium tax reductions.*

*Alabama has elected to follow both options. Alabama's incentive for premium tax reductions has met with some obvious success among the twenty largest foreign insurers shown in Exhibit 12. In 1981, one foreign insurer qualified for the maximum 1% premium tax reduction by investing 11.28% of its admitted assets in Alabama, one foreign insurer qualified for a 0.4% reduction, 3 qualified for a 0.2% reduction, and 9 qualified for 0.1% reduction. The "extra" investments of companies such as these help counteract the drain of funds from those that chose to underinvest in Alabama.*

*Given the potential for foreign insurance companies to channel more funds out of Alabama than they put back in, a state policy of endeavoring to neutralize the capital outflows of some companies with tax reduction incentives for all companies makes good economic sense.*



**And, for much the same reasons, so does heavier taxation of foreign companies. Both are logical in light of the state's low income status and are in keeping with the long-standing state policy of stimulating economic development within the state.**

***State Purpose #1 and Its Effects***

***To raise revenue for the state treasury.*** **Without question, one purpose of Alabama's premium tax law is to increase tax revenues. But what is not so clear is whether the purpose of increased tax revenues is best served by a policy of equal premium tax rates or differential tax rates for foreign and domestic insurers. It is virtually certain that an objective of raising X amount of dollars in tax revenue for the state treasury can be achieved through several approaches to taxing the insurance industry. One way would be to establish a policy of a single tax rate for foreign and domestic firms, with the size of the rate being pegged at whatever value it takes to achieve the target revenue objective. A second approach would be to elect a policy of taxing domestic firms at a higher rate than foreign firms (as has been done in Connecticut because so many of the nation's largest insurers are headquartered in Connecticut); with a differential approach, however, there are the further choices of whether the rates should be set either deliberately close or far apart and what the tax rates should be to generate the target revenue. A third approach would be to elect a policy of taxing foreign firms at a higher rate than domestic firms, but again there arises the options of (a) setting the rates of the two classes of firms either close together or far apart and (b) what size value the rates should assume to achieve the revenue objective. Then there are the additional issues of (1) whether there should be any special exemptions and, if so, what kind and (2) whether all types of insurance premiums should be subjected to the same rate or to dif-**

ferent rates. To see the ample variety of insurance premium taxation one need look only at the 50 states thenselves. Each state, to one degree or another, has opted for its own special version of rates, features, definitons, exemptions, and exceptions.

The point here is that it is a gross oversimplification to view insurance industry taxation as merely to raise revenue. Since a given amount of tax revenue can be raised through any number of approaches and options, then it stands to reason that a legislature's choice among all these options hinges on considerations other than just revenue. In the case of Alabama's policy of taxing insurance premiums, it is clear that there is ample room for other legitimate state purposes to be served besides just revenue considerations. Thirteen other state purposes have been enumerated and discussed. It scarcely needs arguing that some or all of these other 13 purposes could have had a bearing on Alabama's choice of which one of the many options to elect. Given that the same amount of tax revenue can be raised from any of several tax policy options, there is a very strong presumption that the legislative choice among these "equal-revenue" options is governed heavily by desires to serve as many other state purposes as circumstances permit. The "wisest" or "best" tax policy option may well be one that, in addition to meeting tax revenue needs, promotes the achievement of as many other high priority state purposes as seems feasible, given the constraints and tradeoffs.

*Conclusions*

The foregoing analysis of differential taxation of foreign and domestic insurers in Alabama and other states leads to two primary conclusions:

1. A policy of taxing the premiums of foreign and domestic insurers at different rates is fully capable of serving a number of legitimate state purposes other than just raising revenue for the state treasury.
2. The available evidence in Alabama (and other states with a differential premium tax policy) is that these state purposes are actually being achieved.



Alabama's experience with differential premium taxation during the 1955-1981 period has many positive signs and attributes. To begin with, using tax incentives to encourage insurance companies to locate their headquarters operations in Alabama has paid off in the form of added jobs and payrolls—a much-needed contribution to Alabama's less-developed economy.

Second, lower premium taxes have had pro-competitive effects on the insurance marketplace in Alabama. Barriers to entry have been lowered, with the result that new entry of domestic firms has been active. Fledgling firms have enjoyed a more favorable climate for survival; yet, foreign insurers have prospered, entering the Alabama market in ever increasing numbers. The market share of foreign property and casualty insurers in Alabama is over 85 percent of total premiums written statewide; excluding Blue Cross-Blue Shield, the share of premiums written in Alabama by foreign life insurers has risen from about 62 percent in 1955 to almost 75 percent in 1980. This has occurred despite the heavier taxation of foreign insurers' premium income, and it indicates that Alabama's differential taxation policy has not unduly hindered the competitive abilities of foreign insurers. Rather, the net effect has been to increase the contestability of Alabama's insurance market and to help sustain the competitive vitality of Alabama's domestic insurers. Without the benefits of differential taxation, Alabama's domestic insurance industry would surely be thrust into a competitively weaker position—an outcome that would redound to the benefit of foreign in-

surers, strengthening even more their already strong market dominance.

Third, the more vigorously contestable and competitive insurance market in Alabama has paid handsome dividends to the general public. The range of consumer choice among alternative insurance companies has been usefully expanded. The use of insurance by Alabama citizens and businesses has been enhanced. The average level of life insurance coverage per family in Alabama is well above what might be expected on the basis of per capita incomes in Alabama. Domestic insurers have made a useful and important contribution to extending insurance services to Alabama's rural and sparsely populated areas.

Fourth, Alabama's use of differential premium taxation has tended to be supportive of greater capital availability and capital investment in Alabama. Reducing the premium taxes of foreign insurance companies by .1% for each 1% of their admitted assets in Alabama acts as an incentive for foreign companies to increase their Alabama investments above what they might otherwise elect to invest in the state. Moreover, encouraging the growth of a domestic insurance industry in Alabama through differential premium taxation promotes capital availability and economic growth due to the general practice of domestic insurers to (a) deposit a much higher percentage of their cash assets in Alabama banks and (b) allocate significantly higher percentages of their assets to in-state investments.

These are considerable benefits and, on the whole, they solidly confirm that the several non-revenue purposes of differential premium taxation in Alabama are both legitimate and in the process of being achieved.

[Exhibits 1-14 and Appendices A and B to Exhibit II to Affidavit of Arthur A. Thompson, Jr., Ph.D. appear as item (1) in Volume II of this Joint Appendix.]



## EXHIBIT "B"

## IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

[Title Omitted]

## AFFIDAVIT OF GEORGE A. OVERSTREET JR., Ph.D.

STATE OF ALABAMA )
)
JEFFERSON COUNTY )

Before me the undersigned authority in and for said County in said State personally appeared George A. Overstreet, Jr., who being by me first duly sworn deposes and says:

1. My name is George A. Overstreet, Jr. Attached as Exhibit I to this affidavit is a copy of my current resume, reflecting my education, training, experience and qualifications.

2. At the request of counsel for the defendant I made a study of the purposes and effects of Alabama's differential premium tax policy for foreign and domestic insurance companies. Attached as Exhibit II to this affidavit is the result of this study. The analyses, conclusions and opinions reflected in Exhibit II are my own.

3. The statistical data utilized in Exhibit II were obtained from either (a) publications, (b) summaries and public records of the Alabama Department of Insurance or (c) the survey described in Ira L. Burleson's Affidavit dated April 29, 1982.

4. All publications cited in Exhibit II are in my opinion authoritative, standard and trustworthy. All insurance industry data are taken from standard sources, all

population and economic data are drawn from standard government sources, and both represent to the best of my judgment the best available evidence on the subjects in question. The summaries and public records of the Alabama Department of Insurance which I used in preparing Exhibit II are those described in Phillip E. Stano's Affidavit dated April 29, 1982.

/s/ George A. Overstreet, Jr.
GEORGE A. OVERSTREET, JR.

[Subscription omitted in printing]



**EXHIBIT I**

GEORGE A. OVERSTREET, JR.

Vita

November 1981

ADDRESS:

(Office)

University of Alabama in Birmingham
University Station
Birmingham, Alabama 35294
(205) 934-6066

(Home)

3873 Spring Valley Ct.
Mountain Brook, Alabama 35223
(205) 967-6925

PERSONAL:

Born—April 10, 1944

Height and Weight 5'9"—152 lbs.

Married—no children

EDUCATION:

Huebner Postdoctoral Fellow, The Wharton School of Finance and Commerce, University of Pennsylvania, 1978-1979.

Ph.D. Major field—Finance; Minor Fields—Economics, Insurance, Quantitative Methods, University of Alabama, Tuscaloosa, Alabama, 1976.

M.B.A. University of Texas at Austin, 1972.

M.A. Finance and Insurance, University of Alabama, 1971

B.B.A. Finance, University of Texas at Austin, 1966.

## ACADEMIC EXPERIENCE

1980-1981 Visiting Associate Professor of Finance, McIntire School of Commerce, University of Virginia.

1977-Current University of Alabama in Birmingham, Associate Professor of Business Administration; Secondary Appointment in School of Public Health.

1974-1976 University of Alabama in Birmingham, Assistant Professor of Business Administration.

1971-1974 Stillman College, Tuscaloosa, Alabama, Instructor.

1966-1967 Research Assistant, Finance Department, University of Texas at Austin.

## SCHOLASTIC HONORS

Scholastic Achievement Award, Oklahoma State University Athletic Department, 1963.

President's Honor Roll, Phi Eta Sigma (Freshman Honorary Society), Oklahoma State University, 1963-1964.

Texas Cowboys (Honorary Service Society), University of Texas, 1964.

W. Steward Boyle Scholarship, University of Texas, 1965.

Texas Fire and Casualty Insurance Scholarship, University of Texas, 1967.

Omicron Delta Epsilon, Honorary Society in Economics.

National Defense Education Act Fellowship, University of Alabama, 1968-1970.



Huebner Postdoctoral Fellowship, The Wharton School, University of Pennsylvania, 1978-1979.

Ayers Fellowship, The Stonier Graduate School of Banking, Rutgers University, Summer, 1980.

## PUBLICATIONS

### Articles

"Student Dental Health Program of the University of Alabama in Birmingham: VII. Financial Analysis," *Alabama Journal of Medical Sciences*, October 1971. Condensed in *Dental Abstracts*, 18:121, February 1973, (co-author).

"Managerial Characteristics of Dentists: I. Styles of Management Inventory," *Journal of Dental Education*, October 1972, (co-author).

"Comparison of Computer Generated Data with Actual Use of Therapists," *Journal of Dental Education*, February 1973, (co-author).

"Demonstration of an Incentive Compensation Plan for Publicly Funded Group Dental Practices," *Alabama Journal of Medical Sciences*, April 1973, (co-author).

"Managerial Characteristics of Dentists: II. Leader Behavior Description Questionnaire," *Journal of Dental Education*, May 1973, (co-author).

"Managerial Characteristics of Dentists: III. Leader Behavior Description Questionnaire," *Journal of Dental Education*. November 1972, (co-author).

"Economic Implications of Adding One Therapist to a Practice," *Journal of the American Dental Association*, June 1973, (co-author).

"Economic Implications of Adding Two Expanded Duty Assistants To A Practice," *Journal of the*

*American Dental Association*, September 1973, (co-author)

"Productivity and Economic Implications of a Simulated Practice Using Expanded Duty Dental Assistants," *Community Dentistry and Oral Epidemiology*, Copenhagen, Denmark, No. 6, 1978.

"An Empirical Investigation of Comparative Job Satisfaction Levels Among Bank Managers," *Journal of Bank Research*, Winter, 1978, (co-author).

"A Study in Waiting Line Patterns," *Credit Union Executive*, Fall 1979.

"Motor Vehicle Inspection and Accident Mortality: A Multivariate Analysis," *Journal of Risk and Insurance*, forthcoming, (co-author).

"Forecasting Long-Term Facility Needs: A Review of One Credit Union's Experience," *Credit Union Executive*, forthcoming.

"The Site Selection Decision: A suggested Approach," *Credit Union Executive*, forthcoming.

"The Branching Decision: An Investment Oriented Approach," *Credit Union Executive*, forthcoming.

"The Economic Impact of the New Health Practitioner: A Review," *The American Journal of Primary Health Care*, March-April, 1981.

Chapter in Book

"The EDDS and the American Dental Care Delivery System: A Reexamination of A Priori Assumptions," in *Problem Oriented Approach to Community Dental Health*, edited by Stephen L. Silverman and Anne F. Tyrus, PSG Publishing Company, Inc., 1980.

Monograph

*An Attitudinal Survey of Alabama Credit Union Decision Makers Relative to the Strategic Environment and Selected Policy Issues*, monograph published by the Alabama Credit Union League, January 1979, pp. 1-350.



Case

"Security Federal Savings and Loan Association-Cedartown Branch," a case concerning lease financing, published by Intercollegiate Case Clearing House, Boston, Mass., 1977, (co-author).

Papers Presented and Published in Proceedings

Simulating the Impact of Expanded Delegation of Dental Procedures," paper presented at Winter Simulation Conference, San Francisco, January 1973, (co-author).

"Factors Influencing Practice Location and Job Satisfaction: Rural/Urban Dentists," paper presented at the American Association of Dental Research, April 1975, New York, New York (primary author), abstracted in *Journal of Dental Research*, Special Issue 54A: 56, February 1975.

"Productivity of A Simulated Dental Practice Using Expanded Duty Auxiliaries," a paper presented at American Association of Dental Research, April 1975, New York (co-author); abstracted in *Journal of Dental Research*, Special Issue 54A, 1973, February 1975.

"Impact of Operator Speed Upon Optimum Team Mix: A Simulation Study," paper presented at International Association of Dental Research, April 1975, London, England; abstracted in *Journal of Dental Research*, Special Issue 54A, L552-B, February, 1975.

"Economic Impact of Expanded Duty Auxiliaries in a Simulated Practice," paper presented at Interna-

tional Association of Dental Research, April 1975, London, England; abstracted in *Journal of Dental Research*, Special Issue, 54A, 139, February 1975, (co-author).

"The Current Real Estate Mortgage Market as a Limiting Factor in the Market for a Single Family Residence," paper presented at 82nd Annual Meeting of the Alabama Academy of Science, April, 1975; abstract published in *Proceedings*, (co-author).

"Factors Influencing Practice Location and Subsequent Job Satisfaction: Rural versus Urban Dentists," paper presented at Eleventh Annual Meeting Southeastern Chapter, The Institute of Management Sciences and published in the *Proceedings*, October 1975.

"Economic and Staffing Implications of Dental Operator Procedure Time: A Simulation Study," paper presented at Eleventh Annual Meeting Southeastern Chapter, The Institute of Management Sciences and published in the *Proceedings*, October 1975, (co-author).

"Public Policy Implications of the Rural/Urban Practice Location by Dental Practitioners," paper presented and published in *Proceedings*, Second Annual Conference on Health Care Delivery Systems, Miami, Florida, sponsored by University of Miami, November 1975.

"The Rehabilitation of Existing Housing: Current Status and Prospects in Birmingham, Alabama," paper presented at 1976 Annual Meeting of Southern Science Association and published in *Proceedings*, April 1976, (co-author).

"Motor Vehicle Inspection and Accident Mortality: A Reexamination," paper presented at the Tenth



Annual Meeting of the International Insurance Seminars, Inc., August 1978, Oslo, Norway, and published in *Proceedings*, August 1978, (co-author).

"Motor Vehicle Inspection and Roadway Fatalities: An Analysis of the U.S. Experience," paper presented and published in *Proceedings*, European Meeting of Statisticians, Leuven, Belgium, August 1977, (co-author).

"Estimating the Mean Lifetime of Declining Cash Flows," paper presented and published in *Proceedings*, Southeastern AIDS, 9th Annual Meeting, August 1978, (co-author).

"The Site Selection Decision: A Modified NPV Approach," paper presented at Eastern Finance Association, April 1980.

In Process

"Credit Unions and the Competitive Environment: The Managerial Perspective."

"Readability of Bank Annual Reports: A Time Series Analysis."

"Retail Branching Behavior of Depository Financial Institutions: A Multivariate Analysis."

"Economic Impact of the New Health Practitioner: A Simulation Analysis."

CONSULTING ACTIVITIES

Resource Consultant in Finance, Random House Publishing Co., 1977.

Consultant to Alabama State Legislature's Committee on Housing, 1976.

Educational Consultant for Underwriter Training, General Reinsurance Corporation, Greenwich, Connecticut, 1975.

Expert Witness Testimony, Valuation of Lost Earnings, Three Swine Flu Death and Disability Cases, Ms. Sharon Lovelace, U. S. Justice Department, Birmingham, Alabama, 1980.

Expert Witness Testimony, Valuation of Lost Earnings in a Wrongful Death Suit, L and N Railroad, represented by Lang, Simpson, and Sommerville, Mr. Henry Simpson, Esq., 1978.

Development of Marketing Program to Increase Core Savings, Metro Bank, 1980.

> "A Market Analysis of MetroBank's Retail Customer Base: Implications for Developing Greater Core Savings Deposits," unpublished consulting report, March 25, 1980, pp. 1-80.

Operational Audit for Jefferson County Teachers' Federal Credit Union, 1980.

> "An Operational Audit for Jefferson County Teachers' Credit Union: Final Report," unpublished consulting report, pp. 1-86, September 1980.

Valuation of a Closely Held Corporation, Expert Witness Testimony, Lange, Simpson, and Sommerville, 1978.

Net Present Value Analysis of Passive Solar System for Alabama Primary School, Cobb, Adams, and Benton, Inc., 1980.

Valutation of a Regional Finance Company, Truth in Lending Suit, Mr. H. Caddell, Legal Services Corporation, Inc., Montgomery, Alabama, 1979-80.

Evaluation of a Proposed Five-Year Advertising Strategy for Credit Union National Association, Mr. Walter Bagot, Garrison, Jasper, Rose, and Company, Indianapolis, Indiana, 1980.



Bank Feasibility Analysis, Fultondale, Alabama

> "Banking Needs in Fultondale, Alabama," unpublished consulting report, 1974.

Bank Feasibility Analysis in Bessemer, Alabama

> "Banking Needs in Bessemer, Alabama" unpublished consulting report, 1977.

Capital Adequacy of a Texas Bank, January 1975.

Valuation and Sale of a Texas Bank 1979.

Bank Feasibility Analysis, Blount County, Alabama.

> "Banking Needs in Smoke Rise, Alabama," unpublished consulting report, 1978.

Feasibility Analysis for a New Credit Union Common Bond, Alabama Credit Union League, 1978.

Facility Need Analysis for a Large Credit Union,

> "A Forecast of Future Facility Requirements and Analysis of Alternatives within a Capital Budgeting Framework: A Study for Iron and Steel Credit Union," unpublished consulting report, pp. 1-90, 1978.

Cash Flow Forecast, Iron and Steel Credit Union, 1979.

Strategic Planning Analysis, Alabama Credit Union League, see report under Publications-monograph, 1979.

Cash Flow Forecast, Alabama Credit Union League, 1979.

Strategic Branch Plan for MetroBank, Jefferson County, Alabama, 1979.

> "Retail Branching Opportunities Within Jefferson County: An Investment Analysis," unpublished consulting report, pp. 1-96, December, 1979.

Comparative Evaluation of Teller Performance, Central Bankshares of South, Inc., Birmingham, Alabama, 1980-81.

A Simulation Analysis of Teller Staffing Requirements for the Tarrant Branch, Iron and Steel Credit Union, Birmingham Alabama, April 1980.

The Impact of Regulation E upon Demand Deposit Statement Format: Implications for Consumer Acceptance, Central Bancshares of the South, Inc., April, 1980.

A Capital Budgeting Analysis of Loan Refinancing Alternatives, Central Bancshares of the South, July, 1980.

Annual Update of Facility Needs Forecast, Iron and Steel Credit Union, Birmingham, Alabama, 1980.

Loss of Market Share: A Policy Oriented Analysis, Central Bancshares of the South, 1980-81.

"Relative Importance of Retail Banking Attributtes: A Policy Oriented Analysis of the Decatur, Alabama, Market," unpublished consulting report, pp. 1-129, January 14, 1981.

Planning an Optimal Service Delivery System for a Regional Bank Holding Company in the Eighties, Central Bankshares of the South, July, 1981.

"A Strategic Branch Planning Analysis for Central Bank of Birmingham within Jefferson County," unpublished consulting report, pp. 1-350, July 8, 1981.

Valuation of Lost Earnings in a Wrongful Death Suit, Mr. Arthur P. Bolten, Foster, Commell, and Bolten, Birmingham, Alabama, current.

An Operational Audit of Listerhill Credit Union, Sheffield, Alabama, May 1981.

"An Operational Audit of Listerhill Credit Union," unpublished consulting report, pp. 1-121, May 18, 1981.



A Capital Budgeting Analysis of Relocating an Urban Branch Bank and Establishing a Satellite Commercial Loan Office in Conjunction with the Relocation, Central Bank of Birmingham, June, 1981.

Structure and Plan of Initiation for a Telephone Marketing/Service Center, Central Bankshares of the South, August, 1981.

Shopping Habits and Bank Determinant Attributes of a Suburban Retail Banking Population in the Southeast, Central Bank of Birmingham, October, 1981.

Initiation of Capital Budgeting into the Strategic Planning Process, Birmingham/Atlanta Stove Works, Inc., current.

Development of a Credit Scoring System for Jefferson County Teachers' Credit Union: A Multivariate Approach, current.

Feasibility of a Shared Delivery System for Credit Unions, Alabama Credit Union League, current.

## SERVICE ACTIVITIES

Alabama Insurance Planning Commission, 1974-1981.

Identification and evaluation of historic buildings, Greene County Historical Society, 1975-1977.

Searcy House Committee, Tuscaloosa Historical Society, 1976-1977.

Stringfellow House Committee, Greene County Historical Society, 1980.

Curriculum Consultant, Finance Program, International College of the Caymans, 1979.

Seminar Leader, Fifth Annual Insurance Agents Workship, University of Alabama, February 12-14, 1978.

Alabama Credit Union Managers Conference, Seminar Leader, August, 1980.

*Keynote* Speech for Alabama Credit Union Development Conference,

"Alabama Credit Unions in the Eighties: A Strategic View," December 7, 1980.

## PRIMARY RESEARCH INTERESTS

Management of financial intermediaries

Health care delivery systems

## COURSES TAUGHT

Management of Financial Intermediaries

Introduction to Financial Markets

Security Analysis

Money and Banking

Corporate Finance (Undergraduate and M.B.A. levels)

Advanced Corporate Finance

Personal Insurance Planning

Risk Management

Principles of Real Estate

Real Estate Investment Analysis

## PROFESSIONAL INVOLVEMENT

### Memberships

Financial Management Association

American Risk and Insurance Association

International Insurance Seminars, Inc.

American Management Association

American Association for Dental Research



### Offices

Deputy Secretary General, International Insurance Seminars, Inc.

Board of Governors, International Insurance Seminars, Inc.

### Recent Seminars Attended

Seminar on the Federal Home Loan Bank System, 1979

Educators Conference on the Chicago Board of Trade, Dec. 4-5, 1978

Inflation and the Pension Movement, Pension Research Council,

Wharton School of Finance and Commerce, University of Pennsylvania, 1979

### Non-professional Memberships

National Trust for Historic Preservation

Association for Preservation Technology

Alabama Historical Society

Greene County Historical Society

Tuscaloosa County Historical Society

EXHIBIT II

# An Economic Analysis of the Premium Tax Differential in Alabama

George A. Overstreet, Jr., Ph. D.

Prepared for
Bradley, Arant, Rose & White

April 29, 1982



## CONCLUSIONS

Review of the economic evidence available in this case, in light of accepted economic principles, indicates that the state's differential premium tax has a sound conceptual and empirical basis. The relationship of barriers to entry and, hence, the competitive state of a market is well recognized. The insurance market is characterized by significant barriers to entry, more specifically scale economies and large capital requirements. Based upon my review of the evidence and the literature, both of these barriers are demonstrable aspects of the insurance industry.

The theoretical impact of Alabama's premium differential tax is beneficial in reducing each barrier. Moreover, I have concluded that there is a specific financial benefit to a domestic firm of the tax shelter provided by the differential tax rates. The heavy capital needs of young, growing insurance companies are therefore enhanced by the tax differential, and the tax is not detrimental to the level of foreign insurer competition in Alabama.

The differential tax in Alabama thus encourages young, growing companies, and Alabama has realized visible economic benefits from its viable domestic insurance industry. The much greater propensity of domestic companies to both invest in Alabama assets as well as place their bank deposits in Alabama banks provides highly significant incremental economic benefits arising from the domestic insurance industry. In a similar vein, incremental home office employment and, hence, payrolls have a multiple effect of a countercyclical nature in an economy where it is currently much needed.

Lastly, my review leads me to conclude that the benefit of greater and more varied insurance coverage for Alabama consumers has partially arisen from the growth of a domestic insurance industry. The domestic companies have demonstrably emphasized more rural, less

affluent market segments than their foreign counterparts. This is shown by comparing types of relative coverage written and average policy sizes plus the relative dispersion of agents in rural areas for domestic versus foreign insurers. As a final note, the evidence indicates to me that the relative rise in insurance coverage for Alabama family units over the past three decades has resulted partially from the different marketing thrust of the domestic insurers.

In essence, I have analyzed the rationale for the Alabama differential premium tax from an economic perspective. It has a sound basis conceptually or theoretically. Moreover, this sound concept has sufficient data to support its empirical validity. And, most importantly, the public policy has achieved solid economic results in both a more responsive and competitive insurance marketplace and significantly higher level of secondary investments within Alabama as well as additional jobs and, hence, payrolls.



**EXHIBIT "C"**

**IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA**

[Title Omitted]

**AFFIDAVIT**

1. My name is Ira L. Burleson. I have been an officer and employee of Liberty National Life Insurance Company, Birmingham, Alabama since 1950 and have thus been involved with the insurance industry for more than 30 years.

2. I personally requested that Old Southern Life Insurance Company, Mutual Assurance Society of Alabama, Southern United Life Insurance Company, Protective Life Insurance Company, National Security Insurance Company, Employers Life Insurance Company of Alabama, Inc., National Security Fire and Casualty Company, Life Insurance Company of Alabama, Liberty National Life Insurance Company, American Liberty Insurance Company, Champion Insurance Company, Alabama Farm Bureau Mutual Insurance Service, Inc., Federated Guaranty Mutual Insurance Company, Alabama Farm Bureau Mutual Casualty Insurance, Federal Guaranty Life Insurance Company, Mutual Savings Life Insurance Company, Loyal American Life Insurance Company, and Southern Guaranty Insurance Company, supply me with certain information regarding the said companies' respective investments in Alabama, their respective premium income generated in Alabama, the number of persons employed by each in Alabama, and the amount paid by each to their Alabama employees. I requested that the companies provide this information on forms generated under my supervision. A true and correct copy of the form sent to the said companies is attached hereto as Exhibit 1.

3. To the best of my knowledge and belief the information requested in such form was not available from any other source.

4. The information was supplied by responsible and knowledgeable persons within each responding company. In my judgment this method of obtaining the information requested within the insurance industry is a reasonably reliable method.

5. Attached hereto as Exhibits 2 through 19 are true and correct copies of the forms returned by the said companies with the requested information thereon.

I caused the information obtained from this survey in the form of Exhibits 2 through 19 to be furnished to Dr. Arthur Thompson and Dr. George A. Overstreet, Jr.

/s/ Ira L. Burleson
IRA L. BURLESON

[Subscription omitted in printing]

[Exhibits 1-19 to Affidavit of Ira L. Burleson appear as item (2) in Volume II of this Joint Appendix.]



## RESUME OF IRA L. BURLESON

Professional positions:

Vice Chairman of the Board of Directors and General Counsel of Liberty National Life Insurance Company; Vice Chairman of the Board of Globe Life and Accident Insurance Company; Vice Chairman of the Board of Rockford Life Insurance Companies; and Executive Vice President and General Counsel, Liberty National Insurance Holding Company.

Professional Organizations and Offices:

Member of the American and Alabama Bar Associations; President of the Association of Life Insurance Counsel; Advisory Committee to NAIC TASK Force on Home Service Life Insurance (Chairman of Study Group on Marketing Practices); Member, Committee on Legislation, American Counsel of Life Insurance; Vice Chairman of the Committee on Life Insurance Law of the Insurance and Tort Section of the American Bar Association; State Vice President for Alabama for the American Counsel of Life Insurance; Chairman of the Committee of the Birmingham Bar Association on Judicial and Legal Reforms; Member, Advisory Committee of the Alabama Bar Association on the Revision of the Alabama Corporation and Partnership Laws; Member, Counsel on Anti-Trust Laws, U.S. Chamber of Commerce; Member, Task Force on Anti-Trust Laws of the American Counsel of Life Insurance; Member, Committee on Corporate Governance of American Counsel of Life Insurance; Member, Legislative Committee of the Association of Alabama Life Insurance Companies.

**EXHIBIT "B"**

**IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA**

[Title Omitted]

**AFFIDAVIT OF
PHILLIP E. STANO**

STATE OF ALABAMA )
)
JEFFERSON COUNTY )

Before me the undersigned authority in and for said County in said State personally appeared Phillip E. Stano, who being duly sworn by me deposes and says:

1. My name is Phillip E. Stano. I am General Counsel of the Alabama Department of Insurance, being an Assistant Attorney General of the State of Alabama assigned to the Alabama Department of Insurance.

2. Attached to this affidavit as Exhibits 1 through 10, inclusive, are summaries prepared under my supervision and control. I furnished these summaries to Dr. Arthur A. Thompson, Jr., and Dr. George A. Overstreet, Jr. The source materials for these summaries were the public records of the Alabama Department of Insurance.

3. I also furnished portions of the public records of the Alabama Department of Insurance (consisting of the Annual Statements and the Premium Tax Statements of various insurance companies and the Annual Report of the Commissioner of Insurance, State of Alabama, for various years) to Dr. Thompson.

4. In addition to the summaries and public records referred to in paragraphs 2 and 3 above, I furnished to Dr. Overstreet certain Annual Statements and Premium Tax Statements obtained either from (a) insurers in response to Rule 34 Requests for Production in this case or (b) the insurance departments of various states.



5. The public records referred to in paragraphs 2 and 3 above and the documents referred to in paragraph 4 above are numerous and voluminous, such that inspection and compilation by the Court would be unreasonable and impractical. These public records and documents are, however, available to the plaintiffs for inspection at the Alabama Department of Insurance.

6. As General Counsel of the Alabama Department of Insurance, I have been assigned by the Commissioner of Insurance of the Alabama Department of Insurance responsibility for defending these cases and custodial responsibility for the public records of the said department as needed for these cases. The public records referred to in paragraphs 2 and 3 above are the official records kept by the State of Alabama, Department of Insurance.

/s/ Phillip E. Stano
PHILLIP E. STANO

[Subscription omitted in printing]

[Exhibits 1-10 to Affidavit of Phillip E. Stano appear as item (3) in Volume II of this Joint Appendix.]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. 81-996-Th

THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation,
*Plaintiff,*

v.

TRAPP FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama Corporation, et al.,
*Intervenors.*

[Filed April 30, 1982]

---

**[INTERVENORS'] MOTION FOR SUMMARY JUDGMENT**

Come now Defendant/Intervenors and move the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, a summary judgment in the Defendant/Intervenors' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the Defendant/Intervenors are entitled to a judgment as a matter of law.

This motion is based on the pleadings, interrogatories number 78, 79 and 80 and the plaintiff's answers thereto, Defendant/Intervenors' and Defendant Forrester's List of State Purposes and plaintiff's responses thereto, and



the affidavits of Dr. Arthur A. Thompson, Jr., Dr. George A. Overstreet, Jr., Ira L. Burleson and Phillip E. Stano, attached and made a part as Exhibits "A," "B," "C," and "D," respectively to Defendant Forrester's Motion for Summary Judgment in Civil Action No. 81-996-Th, which affidavits are incorporated herein by reference.

/s/ Harry Cole
HARRY COLE

/s/ Robert W. Bradford, Jr.
ROBERT W. BRADFORD, JR.
Attorneys for Defendant/Intervenors

NOTICE: This motion is set for hearing at 9:00 o'clock, A.M., on Monday, May 10, 1982, before the Honorable H. Randall Thomas, Circuit Judge. ORAL ARGUMENT IS REQUESTED.

/s/ Robert W. Bradford, Jr.
Attorney for Defendant/Intervenors

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. 81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, et al.,
*Intervenors.*

[Filed April 30, 1982]

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**[DEFENDANT'S] MOTION FOR SUMMARY JUDGMENT**

Defendant moves the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, a summary judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

This motion is based on the complaint, the answer, interrogatories number 78, 79 and 80 and the plaintiff's answers thereto, defendant's List of State Purposes and plaintiff's response thereto, and the affidavits of Dr.



Arthur A. Thompson, Jr., Dr. George A. Overstreet, Jr., Ira L. Burleson and Phillip E. Stano, attached as Exhibits "A," "B," "C," and "D," respectively, to defendant's Motion for Summary Judgment in Civil Action No. 81-996-Th, which affidavits are incorporated by reference herein.

/s/ Phillip E. Stano
PHILLIP E. STANO

/s/ Warren B. Lightfoot
WARREN B. LIGHTFOOT

/s/ E. Mabry Rogers
E. MABRY ROGERS
Attorneys for Defendant

NOTICE: This motion is set for hearing at 9:00 o'clock, A.M., on Monday, May 10, 1982, before the Honorable H. Randall Thomas, Circuit Judge. ORAL ARGUMENT IS REQUESTED.

/s/ Warren B. Lightfoot
Attorney for Defendant

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. 81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, et al.,
*Intervenors.*

[Filed April 30, 1982]

---

**[INTERVENORS'] MOTION FOR SUMMARY JUDGMENT**

Come now Defendant/Intervenors and move the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, a summary judgment in the Defendant/Intervenors' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the Defendant/Intervenors are entitled to a judgment as a matter of law.

This motion is based on the pleadings, interrogatories number 78, 79 and 80 and the plaintiff's answers thereto, Defendant Forrester's and Defendant/Intervenors' List



of State Purposes and plaintiff's response thereto, and the affidavits of Dr. Arthur A. Thompson, Jr., Dr. George A. Overstreet, Jr., Ira L. Burleson and Phillip E. Stano, attached as Exhibits "A," "B," "C," and "D," respectively, to Defendant Forrester's Motion for Summary Judgment in Civil Action No. 81-996-Th, which affidavits are incorporated by reference herein.

/s/ Harry Cole
HARRY COLE

/s/ Robert W. Bradford, Jr.
ROBERT W. BRADFORD, JR.
Attorneys for Defendant/
Intervenors

NOTICE: This motion is set for hearing at 9:00 o'clock, A.M., on Monday, May 10, 1982, before the Honorable H. Randall Thomas, Circuit Judge. ORAL ARGUMENT IS REQUESTED.

/s/ Robert W. Bradford, Jr.
Attorney for Defendant/
Intervenors

[Certificate of Service omitted in printing]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. 81-996-Th

THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation,
*Plaintiff,*

v.

TRAPP FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation, et al.,
*Intervenors.*

[Filed May 5, 1982]

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**[DEFENDANT'S] RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant responds to plaintiff's Motion for Summary Judgment by saying that plaintiff is not entitled to a summary judgment for the following reasons:

1. As a matter of law the statute in question does not contravene either the Constitution of the United States or the Constitution of the State of Alabama.

2. According to the facts before the Court, defendant is entitled to a summary judgment in his favor.



3. Plaintiff states in its motion that it is offering factual support for its motion but plaintiff failed to file its affidavits with its motion pursuant to Rules 56 and 6(d), Alabama Rules of Civil Procedure. Therefore, no facts are due to be considered in support of plaintiff's motion.

4. Attached hereto and made a part hereof as Exhibit "A" is the Second Affidavit of George A. Overstreet, Jr., Ph. D. This affidavit is offered in opposition to the plaintiff's Motion for Summary Judgment.

/s/ Phillip E. Stano
PHILLIP E. STANO

/s/ Warren B. Lightfoot
WARREN B. LIGHTFOOT

/s/ E. Mabry Rogers
E. MABRY ROGERS
Attorneys for Defendant

[Certificate of Service omitted in printing]

**EXHIBIT A**

**IN THE CIRCUIT COURT**
**OF MONTGOMERY COUNTY, ALABAMA**

[Title Omitted]

**SECOND AFFIDAVIT OF**
**GEORGE A. OVERSTREET JR., Ph.D.**

STATE OF ALABAMA )
)
JEFFERSON COUNTY )

Before me the undersigned authority in and for said County in said State personally appeared George A. Overstreet, Jr., who being by me first duly sworn deposes and says:

1. My name is George A. Overstreet, Jr. Attached as Exhibit I to my affidavit of April 29, 1982, (which affidavit is made a part of the defendant's Motion for Summary Judgment in this case) is a copy of my current resume, reflecting my education, training, experience and qualifications.

2. As stated in my said affidavit of April 29, 1982, I made a study of the purposes and effects of Alabama's differential premium tax policy for foreign and domestic insurance companies. Attached as Exhibit II to the said affidavit of April 29, 1982, is the result of this study. Attached as Exhibit I hereto is a more detailed result of the said study. The analyses, conclusions and opinions reflected in Exhibit 1 are my own.

3. The statistical data utilized in Exhibit 1 were obtained from either (a) publications, (b) summaries and public records of the Alabama Department of Insurance or (c) the survey described in Ira L. Burleson's Affidavit dated April 29, 1982.



4. All publications cited in Exhibit 1 are in my opinion authoritative, standard and trustworthy. All insurance industry data are taken from standard sources, all population and economic data are drawn from standard government sources, and both represent to the best of my judgment the best available evidence on the subjects in question. The summaries and public records of the Alabama Department of Insurance which I used in preparing Exhibit 1 are those described in Phillip E. Stano's Affidavit dated April 29, 1982.

/s/ George A. Overstreet, Jr.
GEORGE A. OVERSTREET, JR.

[Subscription omitted in printing]

**EXHIBIT 1**

# An Economic Analysis of the Premium Tax Differential in Alabama

by
George A. Overstreet, Jr., Ph.D.

Prepared for
Bradley, Arant, Rose & White

April 28, 1982



An Economic Analysis of the Premium Tax Differential in Alabama

I. Introduction

II. Insurance Companies As Financial Intermediaries
- A. Life Insurance Companies
- B. Property and Casualty Insurance Companies
- C. Conclusions

III. Reduction of Barriers to Entry As a Means of Enhancing the Insurance Markets' Competitive Problem
- A. Economies of Scale
- B. Capital Requirements
- C. Comparative Impact of Tax Differential on Foreign and Domestic Life Companies

IV. Investment Behavior of Foreign Versus Domestic Insurance Companies
- A. Comparative Investments Within Alabama
- B. Comparative Deposits in Alabama Banks
- C. Home Office Payrolls of Domestic Insurance Companies

V. Comparative Policy Types and Distribution Systems of Foreign and Domestic Insurance Companies

VI. Conclusions

## INTRODUCTION

The economic rationale and impact of Alabama's differential premium tax on insurance companies can be demonstrated both conceptually and empirically. The purpose of this paper is to analyze both the theoretical rationale and the impact of the tax through secondary data. As we shall see, its rationality rests upon fulfilling the following three major state purposes: (1) enhancement of competitive forces in the state's insurance markets; (2) enlargement of the pool of capital or investable funds within the State; and (3) expansion of the types and insurance delivery systems available to the consuming public. We shall in turn examine the three purposes discussing both the rationale and secondary data relevant to assessing the specific impact of the tax.

There are significant barriers to entry (specifically, capital requirements and economies of scale) present in the insurance industry. It will be seen that both capital requirements and diseconomies of scale are reduced by the impact of differential tax without reducing the competition from out-of-state insurers. Importantly, domestic insurance firms show a decided tendency to invest a much greater proportion of their assets (both long-term and liquid) in Alabama. Coupled with this attractive tendency is the additional factor of greater domestic bank deposits and home office payrolls. For an underdeveloped state such as Alabama, these are all highly desirable forms of economic behavior and make favoring such firms rational vis a vis intrastate taxation policies. Moreover, domestic insurance firms have tended to successfully meet different consumer needs peculiar to the local economy (e.g., industrial life or burial insurance and/or monthly debit ordinary life insurance). Likewise, the dispersion of agents by domestic versus foreign insurers favors the rural, less developed sectors of the state (i.e., those markets which apparently have not been prioritized by large foreign insurers). We will now turn to a more



specific discussion of each major purpose. Prior to this discussion, a brief review of the role of insurance companies as financial intermediaries is in order.

## INSURANCE COMPANIES AS FINANCIAL INTERMEDIARIES

As noted by most writers on financial institutions, the role of insurance companies is highly important to the savings/investment process [39, p.127]. First, such firms serve to spread risk and, hence, reduce the likelihood of financial disaster for both business firms and households. Given such protection, insurance makes it possible for individual economic units (families and businesses) to need less liquidity in their savings for adverse events thereby allowing other savings to be allocated to less liquid forms. This aspect of the insurance role is generally neglected in discussing the intermediary role of insurance companies, but it makes a greater portion of the savings pool available to deficit economic units in a long-term form, other things being equal. Secondly, many insurance contracts (e.g., ordinary life insurance) are for long periods resulting in the need for insurance companies to set aside funds or reserves for losses in the distant future. Hence, insurance protection also involves in varying degrees a resulting accumulation of funds which upon being invested provide significant sources of capital funds to business, individuals, and government. This process places insurance companies, particularly life, in the role of the financial intermediary (i.e., providing a mechanism for channeling funds from surplus or savings units to deficit units, borrowers and investors).

*Life Insurance Companies.* In the case of life insurance companies, this latter intermediary role is most pronounced for whole or ordinary level premium life insurance and annuities. Whole life dates from the eighteenth century and involves a constant annual premium over a policyholder's full life span. The level premium

is at first larger than that necessary to cover the risk of mortality (i.e., the term premium) and less in the later years when mortality risk is higher. It is calculated to take account of the earnings on the excess during the early part of the policy. Such policies provide stated cash values on the excess portion which may be borrowed at specified rates by the policyholder. As such, level premium (or ordinary life forms) plus annuities involve significant savings elements and, hence, form an extremely visible element of financial intermediation (channeling savings in small amounts to borrower/investors in larger amounts).

As one would expect, the reinvestment of insurance company earnings from previous investments contributes heavily to the investment function of such business units. One researcher has approximated that half the net investable flow for life companies comes from insurance operations and half from investment operations [37, pp. 64-65]. With regard to the investment of funds, life insurance companies tend to place an emphasis on (1) matching the term of the investment with the generally long-term nature of their liabilities, (2) put a high priority on investment quality partly to their fiduciary obligations, and (3) avoid cyclically based investment policies as a result of their long-term liabilities and steady cash inflows. In general, tax considerations do not play a major role in life company investment decisions [37, p. 188].

As expected, one researcher has found that the product mix influences the investment portfolio mix in a discernible, but small pattern [38, pp. 20-24]. Emphasis on health insurance tends to result in relatively larger percentages of government bonds, common stocks, and preferred stocks reflecting shorter term liabilities. Group writers show a tendency to emphasize government bonds and deemphasize mortgages. Annuity increases are associated with larger proportions of mortgage loans and



corporate bonds. Naturally, the overall portfolios have decidely shifted in response to interest rate differentials.

*Property and Casualty Companies.* Property and casualty insurance companies comprise more than 2,500 firms selling property/casualty and related lines such as inland marine coverage, surety, and fidelity coverage. Many firms today are now multiple-line companies crossing the property and casualty lines over to life. Property insurance relates to losses to property within policy limits (e.g., fire and related hazards). Casualty insurance covers losses resulting from personal injuries and damage to the property of others. The largest ten companies write approximately 40 percent of the business [39, p. 148].

As discussed earlier, the spreading of risk through the insurance mechanism makes it possible for economic units to accumulate savings in longer-term investments than would be true otherwise. Hence, property and casualty insurers also make a much needed contribution to the intermediary process (channeling funds from ultimate savers to ultimate borrowers/investors). Since the liabilities of property/casualty insurers are much shorter than those for life companies, their asset accumulation is significantly less. Even though such firms are not engaged in an act of savings like whole life or annuity policy contracts, property and casualty insurers accumulate surplus and reserve funds as a result of their business. They are significant purchasers of municipal securities and derive a sizable portion of their income from investments. Indeed, net investment income often exceeds underwriting income and a considerable controversy has arisen over their rate settings being made without consideration of investment income. Given the roles outlines above, analysts generally treat property and casualty insurers as financial intermediaries. From our discussion, it seems apparent that this classification is correct.

*Conclusions.* In summary, both life and property/casualty insurance companies play major roles in the economy's intermediation process (i.e., channeling funds from ultimate savers to ultimate borrowers). Certainly, this role differs greatly from the more obvious role which depository institutions (banks, savings and loans, credit units, and mutual savings banks) play in their important economic process. The insurance industry has added a great degree of stability to the economy. This has been particularly important in stressful periods. For example, Mills [20] found that life insurers lent a great deal of stability to the capital markets during the Great Depression. He noted that in 30 out of 45 states in which home offices were located, not a single company domiciled therein suspended operations during this trying period. This record stands in sharp contrast to that of the banking industry in the same period. Although depository insurance has made it highly unlikely that the United States will ever experience another "banking holiday," the financial strength or stability which the insurance industry affords makes it a highly attractive industry for the economy in general and the state's economy in particular. Moreover, insurance companies domiciled within a state offer the added attraction of large home office payrolls and incremental deposits held in intrastate banks. (Both of these factors will be documented later in this study). As noted above, the important role of insurance companies in the intermediary process (channeling savings to borrowing units) places them in a key position in the economic growth process. The greater propensity of domestic insurance companies to place their highly liquid assets in intrastate banks combined with the additional impact of home office employment within local economies makes the developmnet of an intrastate insurance industry a desirable public policy objective.

In essence, it would appear more desirable to channel insurance premium flows to intrastate institutions. The development of domestic firms should not be at the expense of the public in the form of: (a) inadequate market coverage, (b) less efficient companies, and/or (c) a reduction in competition. The differential premium tax does indeed favor firms domiciled within Alabama in terms of taxing domestic insurance companies (those incorporated in Alabama with their main office and chief place of business within the state) at a lower rate than foreign insurance companies. It will be demonstrated in the following presentation that none of the adverse aspects of domestic favoritism noted above have evolved. Indeed, such a tax incentive is needed to reduce the substantial barriers to successful entry in the insurance industry and, hence, enhance the insurance market's competitive profile. Moreover, this competitive enhancement has neither been detrimental to the continued viability of large foreign insurers nor precluded their participation in market (states) with premium tax differentials. In fact, the marketplace has been enhanced by policy offerings and distribution channels emphasized by domestic as opposed to foreign firms. For example, domestic life insurers write different types of coverage than their foreign counterparts in Alabama by apparently seeking out different market segments. Let us now turn to the analysis itself.



As noted in the introduction, the basic purpose of the analysis is to determine the economic rationale and impact of the insurance premium tax differential in fulfilling the following major purposes: (1) enhancing the competitive profile in the state's insurance markets; (2) increasing the pool of capital available for investment within the state; and (3) better serving the Alabama consumer needs by widening both the policy offerings and necessary distribution channels. Within this section, both the theory and available data necessary to determine the tax's impact will be presented.

## REDUCTION OF BARRIERS TO ENTRY AS A MEANS OF ENHANCING THE INSURANCE MARKET'S COMPETITIVE PROFILE

The need to stimulate economic growth in an underdeveloped state such as Alabama presents the policy maker with a sensitive dilemma. Capital formation is a necessary prerequisite to long-term investment with the need to stimulate the public's savings rate. As described earlier, the insurance mechanism is a favorable inducement to this chain of events.

Underdeveloped economies demonstrate a strong tendency to fail in producing domestic competitors in industries with significant capital and economies of scale requirements for successful entry. The policy maker must tread very lightly in the market so as not to affect too heavily existing competitors by tax favoritism. On the other hand, the stimuli must be significant enough to aid the fledgling firm in hurdling the economic barriers to entry. Bain's now classic *Barriers to Entry* (1956) demonstrated the theoretically strong underpinnings which entry barriers have upon the competitive state of a market [36]. The level of actual competition among existing sellers is certainly an important regulator of business activity. Often overlooked, however, is the potential impact of the *conditions of entry* upon the market. As Bain has noted: ". . . there is considerable evidence of the importance of the condition of entry as a co-regulator of business conduct and performance (p. 3)." This concept can be operationalized as advantages of established sellers (in an industry) over potential entrant sellers. Established firms may indeed exceed the "competitive level of prices" as conditions of entry become progressively more severe. The industry which we are concerned with here is characterized by two significant barriers to entry: (1) economies of scale and (2) capital requirements. Each will in turn be examined prior to evaluation of the relative impact of the tax differential upon foreign and domestic insurers.



As seen above, the need for reducing barriers to entry and, thereby, increasing the insurance market's competitive profile rests on solid theoretical grounds. Existing firm relationships within the industry are of prime importance to the competitiveness of a market. Cummins, Denenberg, and Scheel [5] found that the usual analysis of industry concentration is meaningless for ordinary life insurance and is useful for only a portion of the group insurance market. *By state* concentration data for ordinary, group, and industrial insurance indicates that a significant degree of concentration exists in the life insurance industry. Meaningfully, Alabama ranked rather high among states on the concentration measures employed by Cummins (eleventh in terms of insurance written). Importantly, concentration and competition were found to be inversely related. States with the highest concentration tended to have higher premium rates per dollar of insurance. When insurance markets are more narrowly defined, as by state, the degree of concentration is significantly greater.

Given this perspective (at least for the life markets), it is even more important from a public policy perspective to provide as much competitiveness in the market as possible. As noted above, reducing the barriers to successful entry through the differential premium tax should provide for a more competitive market profile. Let us now demonstrate the reality or empirical validity of the specific barriers: (a) economies of scale and (b) capital requirements.

*Economies of Scale.* It is easily observed, and has become well established in pure and applied price theory, that there exists in any industry a regular relationship between the scale of operations of a plant or a firm and its average costs of production and shipment. Increasing the scale of a firm permits a specialization of factors of production impossible at smaller scales because of indivisibilities in certain factors of production, that is,

certain factors of production must be added discretely as opposed to continuously. This specialization allows real economies in the factors of production used, and therefore allows corresponding cost savings. The economies of large-scale operations in insurance should result from the specialization of labor and of management function. Economies of scale resulting from such specialization are ultimately exhausted. Therefore, at some finite scale, a point is reached where a firm can no longer lower average costs by expanding its scale. In other words, the average total cost curve is L-shaped over the quantity produced.

Many studies of the insurance industry have documented the existence of economies of scale for both life and property and casualty insurers. For life insurers, Cohen[3] gave evidence that economies of scale exist for insurers in the United Kingdom. He found that the average total cost curve, as measured by an insurance expense ratio, slopes downward for small insurers and then becomes flat for larger insurers. Also, Fritchett [26] gave evidence supporting a regular average cost curve for home office expenses for life insurance companies. This curve would show diseconomies for both small and very large insurers, with a relatively wide range between the two. He also found a more flattened average cost curve for field expenses showing scale diseconomies only for the smaller insurers. Fraetz [24] found strong evidence for the existence of economies of scale in a sample of ninety life insurers conducting business in the state of New York. This sample contained evidence of eventual diseconomies for the largest mutual insurers. These studies largely corroborate the work of Houston and Simon [13]. The found increasing returns to scale and then constant returns to scale for a sample of 237 life insurers.

For property and casualty insurers, Doherty [7] showed that significant scale economies exist for Canadian property and casualty insurers. He also explained



that some conflicting results in previous studies were due to underestimation of scale economies caused by the choice of output measures. Hammond, Melander and Shilling [12] found that average operating costs decline with size, showing increasing returns to scale, and then level out as larger premium volumes are achieved, showing constant returns to scale. These studies of scale economies for life and casualty insurers confirmed the earlier generalization by Stigler [32] that customarily a fairly wide range of optimum sizes exists, that is, the average total cost curve is relatively horizontal over a range of sizes, though the average total cost curve is still downwardly sloping for small scales.

In the case of the new insurance firm, however, there is no question that significant diseconomies of scale exist. The impact of the differential premium tax is also quite clear. From an economic perspective, the relative tax relief or shelter simply shifts the average operating expense curve downward, thereby allowing smaller domestic firms to achieve a smaller volume of business to be efficient. This results in turn in a lower capital and surplus requirement for efficient operation.

Having demonstrated the empirical validity or reality of the scale economies barrier and, hence, the need for the differential tax or shelter, we will now turn to the second major barrier to entry—capital requirements.

*Capital Requirements.* It will be our plan here to first demonstrate the existence of capital requirements as a significant barrier to entry in the insurance industry. Having demonstrated the validity of that premise, the relative financial impact of the tax differential upon foreign versus domestic firms will be illustrated.

From 1950 to 1970, over 2,000 life insurance companies were organized in the United States and roughly half were merged, reinsured, or otherwise retired from business. Low capital and surplus requirements during

that period made it relatively easy to organize a stock life insurance firm. The initial capital requirements at that time varied from $70,000 to $4 million [16, p. 16]. Up to 1966 Arizona only required $37,500 initial capital and surplus. Alabama required capital of $200,000 and surplus of $300,000 in 1970, amounts which have now been raised to $1,000,000 and $1.0 million respectively. As a result of the number of excessive failures, it became evident to most states that such low requirements were not realizing an optimal result in terms of enhancing market competitiveness. Exhibit I illustrates the change in such requirements in Alabama over time.

A new life insurance firm suffers large initial surplus requirements as first year acquisition costs must be expensed as opposed to capitalized. For growing firms, this requirement places a heavy burden on the initial surplus. The surplus strain has been found to be the cardinal weakness in life insurance company formation [24, p. 601].

Although the critical issue for a firm is actual insolvency versus technical insolvency, regulatory authorities of most states declare a life company insolvent if its admitted assets are less than the total values of its present liabilities and capital required for the company to do business. Regulatory requirements by the states, including Alabama, consider any impairment of capital as insolvency [38, p. 693]. Hence, new business creates a terrific drain on the surplus account.

Little research has been done to determine an optimum amount of paid-in surplus and capital. A significant exception to this was the simulation study by Leverett in 1971 [16]. As noted, a high ratio of new business to business-in-force depletes the company's assets creating a drain on surplus. For new market entrants to survive, they must be adequately capitalized initially or require continual reinjections of capital and/or reinsure the majority of new business. Using what appears to be a simplified book of business but realistic initial operating expense assumptions, Leverett's simulations suggested that $2.4 million of capital and surplus, of which $400,000 is considered to be capital, was required to maintain solvency during the first 20 years. Indeed, it took 16 years before assets increased at a faster pace than liabilities due to earnings on business-in-force increasing faster than the investment in new insurance written [16, p. 25]. However, many researchers believe that a new life company will have a higher acquisition cost than that reflected in Leverett's basic expense assumption [23, p. 18]. Where Leverett raises the expense assumption, the firm with $2.4 million in capital and surplus becomes technically insolvent after the seventh year [16, p. 26].



Although decreasing sales and/or expenses would be helpful, neither may be realistic for such firms. New York, however, has established limitations on the amount of new business which a firm can write in a given year.

The point at issue in the above discussion is the capital requirements necessary for successful entry into the life insurance industry. Certainly, a tax shelter for insurance companies in their formative period is needed in order to reduce the severe surplus drain faced by new, growing companies in this industry. Alabama, like many other states, erred on the side of leniency in terms of capital requirements during the sixties, i.e., it went too far in reducing the regulatory capital requirements below a point of safety. During this period a tax incentive or shelter such as the premium differential was needed even more in order to successfully reduce entry barriers. However, it would not have been sufficient to overcome the severe surplus drain by itself. Unfortunately, the premium tax differential was eliminated from 1945-55, thereby reducing the one means of relief from surplus drain on young, growing life insurers other than new capital injections and/or heavy reinsurance. For-

tunately, it was reinstated after 1955 (Exhibit 2); and, as noted, the initial capital and surplus requirements were also wisely raised (Exhibit 1). The relative capital requirements and tax differential or shelter now appear to be a reasonable regulatorial compromise in the logical attempt to lower the barriers to successful entry.

Given the validity of the Leverett study, it would appear that even with the rise in Alabama's requirements over the years, as illustrated in Exhibit 1, the requirements may be below an optimal point to insure success. If, on the other hand, capital requirements are too high, new entrants will be thwarted in the early stages of feasibility investigation. In light of the severe surplus drains on the new life insurer, a tax incentive such as the premium tax differential appears to be a rational means of reducing the capital requirement and, consequently, the barrier to entry. By reducing taxes on domestic firms, new entrants would have a lighter expense load and, hence, a greater internally generated capital stream. As we shall see, this is an important source of funds to the new entrant. Indeed, some states, notably Alaska, omit all premium taxes on new life insurers for the first five years of operations.

After a firm passes through the perils of the infant stage and becomes large enough to offset the economies of scale advantage of established firms, it then will need to expand its market coverage into other states in order to grow. Assuming these states also have premium tax differentials, the favorable impact of the home state is reduced. The favorable impact of the tax differential for domestic firms should decline as the company matures and a greater proportion of its premiums are written outside its home territory.

An analysis of data in Exhibit 5 (p. 4) will confirm this hypothesis. For example, the ten largest domestic life insurance firms write an average of 64.8 percent of their life and accident premiums (excluding annuities)



in Alabama. The range is from 94.3 percent for Federated Guaranty Life to only 16.8 percent for Loyal American. Both Liberty National and Protective Life, which are large, mature companies, write only 53.4 and 36.2 percent respectively of such premiums in Alabama. Of further interest in this regard, Liberty National and Protective Life write respectively 27.0 and 35.2 percent of their premiums (excluding annuities) in states other than Alabama which have premium tax differentials. A small company such as Life Insurance Company of Alabama with premiums of $13.8 million in 1981 compared to Liberty National's $276.9 million can also be active in non-Alabama markets. Life of Alabama, for example, wrote 30.9 percent of its premiums in differentially taxed states other than Alabama. Loyal American, with only $22.1 million in premiums, wrote an even larger percent of its business in differentially taxed states (57.4 percent, Exhibit 5, p. 4). It seems safe to conclude that the threat of the differential tax is not keeping Alabama-domiciled firms from expanding into markets which have differential taxes.

As expected, smaller firms such as Southern United Life, Old Southern Life, and National Security Insurance all write less than 20 percent in differentially taxed states other than Alabama. We can conclude that the impact of the tax shelter is working to protect the smaller firms until they reach a size where they can successfully compete in other markets where they may have a premium tax disadvantage. As alluded to earlier, a life company could be well over two decades old before the surplus drain from new business stabilizes.

Property and casualty insurance companies also face capital requirements similar to those described above for life companies. The "Kenney Rule" which suggests a ratio of 2 to 1 for net premiums written to policyholder surplus (mutual) or capital and surplus (stock) has been used as a general guideline by state regulatory authori-

ties. Although regulators do allow arbitrarily a ratio of up to 4 to 1, the Kenney Rule serves as a general guideline to capacity [35, pp. 687-688]. Osborn's [40] now classic explanation on teaching the analysis of property and casualty financial statements contains a clear explanation of the drain on surplus by demonstrating balance sheet changes over time (Table 1, pp. 36-39). Osborn concludes that a property and casualty insurance company, in contrast to other business firms, can have a drain on surplus even with profitable operations. It can easily be demonstrated that larger amounts of written premiums, not reinsured or ceded, will result in faster drains on surplus.

We can conclude, therefore, that fledgling property and casualty insurance companies are also in need of tax sheltering if they are to successfully enter a field which has significant economies of scale and capital requirements. Furthermore, we would expect such firms to lose the favorable impact of Alabama's tax differential as they grow and expand. Given the greater need for geographic diversification in a property and casualty firm's underwriting protfolio, it would be expected that they might cross such market boundaries before life companies. Certainly, diseconomies of scale help to explain the trend toward specialization of Alabama property and casualty, especially in auto, as they seek to overcome diseconomies of scale and capital requirements [41]. As in the case of life insurers, the premium tax differential provides a much needed aid in lowering the barriers to entry and in enhancing competition.

To conclude, property and casualty insurers also have significant capital requirements in their entry stage. As in the case of life insurers, a tax shelter is needed in order to lower the entry barrier and, hence, promote competition.

*Comparative Impact of Tax Differential on Foreign and Domestic Life Companies.* Let us now turn to a



comparative analysis of the impact of the differential tax on the ten largest foreign and domestic life insurance companies. The purpose of the analysis will be to demonstrate (a) that differential premium taxation has not kept the foreign companies from writing a significant portion of their premiums in states with differential taxes and (b) that these taxes do not constitute a large or excessive burden as measured against their total premiums written and capital and surplus.

As we have already seen, the differential tax has not precluded Alabama life insurance companies from writing sizable portions of their total life and accident premiums (excluding annunities for the simulations) in differentially taxed states other than Alabama. As we shall see, this is also true for foreign life insurers. Premium data for states with premium tax differentials listed for the ten largest life companies are arrayed in Exhibit 4 (pp. 1-3). Premiums in these 24 differential premium tax states are then summed and compared to total life and accident premiums written (excluding annuities for computational ease in the tax estimation which follows). As illustrated (Exhibit 4, p.4), differentially taxed premiums (DP) make up rather sizable percentages of total premiums (TP) written by the ten largest foreign life companies. The average ratio for the ten foreign companies is 43.9 percent with Metropolitan at the low point of the range (29.6 percent) and Independent Life and Accident at the high point (61.9 percent). It appears rather obvious that differential premium taxes are certainly not precluding foreign life insurers from participating heavily in states with such taxes.

What of the financial impact of such taxes upon the ten largest foreign and domestic life insurers? Exhibit 4 also contains the estimated differential tax calculated using the approximate differential taxes contained in *State Retaliatory Taxation of the Insurance Industry,*

Council of State Governments, 1977, Appendix 1. Exhibit 3 illustrates these respective state rates. Differential taxes are calculated for each state and summed to a total estimated differential tax per company (Exhibit 4, p. 4). Next, the estimated tax is compared to total premiums and to total capital and surplus. Estimated premium tax differentials were not compared to income for two reasons. First, there is a significant controversy over accounting for income in the life insurance industry [42, pp. 673-675]. Secondly, income data could not be comparably prepared for publicly held stocks, mutuals, and privately held stock companies.

The data for estimated differential premium taxes (TD) were compared by company to total premiums written (TP) and capital and surplus (CS). Exhibit 3 (p. 4) illustrates these final computations or simulations. Note that the premium tax differential averages less than 1 percent (0.73) for the ten companies. The low ratio was 0.34 for Independent Life and Accident which is domiciled in a differentially taxed state (Florida). In contrast, Aetna Life had a ratio of 0.98 percent.

An identical calculation was next performed for the ten largest domestic life companies. These data are summarized in Exhibit 3 (p. 4). Note that for Protective Life and Liberty National, ratios of estimated tax differential (TD) to total premiums written (0.59 and 0.42 percent) are very close to Metropolitan's ratio of 0.57 percent although below the average (0.73 percent) for the foreign life insurers (Exhibit 4, p. 4). As noted earlier, the favorable impact of the tax differential on domestic companies appears to perform as we would expect, i.e., it declines as domestic companies mature and increase their out-of-state writings significantly.

The important point to note in regard to the differential premium tax's impact on the foreign companies is its small overall impact in relationship to premiums written. Indeed, the estimated premium tax differential makes up



a rather negligible (under 1 percent) portion of total premiums written for foreign life insurers. Likewise, it is a small percent of their capital and surplus. As shown in Exhibit 4, the estimated premium tax differential averages only 1.9 percent of capital and surplus for the ten foreign firms (TD/CS, p. 4). Having determined that (a) premium differential states are not being avoided by the large foreign life insurers, and (b) the estimated tax (not including that on annuities for computational ease) comprises a rather insignificant portion of both total premiums written and capital/surplus, we can conclude that the differential tax does not place a burden heavy enough on foreign life insurance to inhibit the competitive framework of the life market. Given the smaller relative market share of domestic property and casualty companies than their domestic life counterparts (13.7 percent versus 43.0 percent, 1981) reported by the Alabama Department of Insurance, it would seem reasonable to expect the same findings to hold for property and casualty insurers.

Having shown that the tax does not impair the competitive ability of the foreign insurers, let us now turn to the question of its impact on the domestic industry. It is assumed from our earlier discussion of the barriers to entry in the insurance industry that the tax differential is indeed needed to reduce the surplus drain or large capital requirements peculiar to young growing insurance companies. Moreover, it serves also to reduce the diseconomies of scale which fledgling companies face by lowering the average operating expense curve. We would expect to demonstrate that the premium tax differential has a significant financial impact on the fledgling insurance company.

Let us first look at the impact of the tax on the two largest domestic life firms. We would not expect the premium tax relief to be a significant portion of total premiums written for Alabama's mature domestic life com-

panies. Indeed, the percent of premium tax relief (2 percent of Alabama Premiums, Exhibit 5) to total premiums written is only 1.06 percent for Liberty National and 0.70 percent for Protective Life. For companies which write most of their business in Alabama, however, the tax relief is more significant. For example, Federated Guaranty Life which writes 94.3 percent of its life and accident premiums in Alabama, has a ratio of 1.89 percent.

Let us now take the specific case of a recently formed property and casualty insurance company and examine the direct financial impact of the differential tax. Exhibit 6 illustrates the estimated financial impact upon a specific property and casualty company formed in 1972 and a life company in 1966. The premiums written per annum and capital and surplus for December 31, 1981 form the basis for the analysis. The tax differential or shelter is estimated by taking the respective tax differential (3 percent and 2 percent) of total cumulative Alabama premiums written. Its impact on capital and surplus is estimated by simply dividing the tax shelter by capital and surplus less the tax differential. As illustrated in Exhibit 6 (p.1), the case property and casualty company's capital and surplus was 25.98 percent higher due to the favorable tax differential than it would have been otherwise.

As was earlier suggested, growth in surplus is a key goal in overcoming the surplus drain problem of both new life and property casualty insurers. The amount of insurance that may safely be written, after considering reinsurance ceded, is dependent upon the capital and surplus of the insurer. Mehr and Cammack [38] note that this limitation has periodically caused "capacity" problems, that is, the capacity to write new business, especially among property and casualty insurers (pp. 687-688). Pfeffer [22], Pfeffer and Newmann [23], and Leverett [16] all have emphasized the crucial element of



adequate capital and surplus for the success of a new life insurance company.

A more generalized estimate of the tax differential's impact upon the generation of capital and surplus and, hence, the level of capacity for property and casualty insurers will now be calculated. Let us measure (a) the volume of business by the ratio of net premiums written (premiums written after consideration of reinsurance) to capital and surplus, and (b) the impact of the tax differential by the ratio of the tax differential or shelter (the increase in taxes a firm would pay if it were taxed at the foreign rate) to net premiums written. It can then be shown that the product of the two ratios measures the impact of the tax differential upon the capital and surplus of the insurer. Algebraically, this concept can be shown simply as:

$$\frac{\text{Net Premiums Written}}{\text{Capital \& Surplus}} \times \frac{\text{Tax Differential}}{\text{Net Premiums Written}} = \frac{\text{Tax Differential}}{\text{Capital \& Surplus}}$$

$$\frac{NPW}{CS} \times \frac{TD}{NPW} = \frac{TD}{CS}$$

For property and casualty insurers, the ratio of net premiums written (NPW) to capital and surplus (CS) may vary from one to four depending upon the lines written, underwriting policies, the insurance commissioner's regulatory stance, etc. For a property and casualty firm, the per annum impact upon the growth of caiptal and surplus due solely to the tax differential is from 3 percent to 12 percent, assuming Alabama's three percent differential. This can be shown as follows:

$$\frac{NPW}{CS} \times \frac{TD}{NPW} = \frac{TD}{CS}$$

$$\frac{4}{1} \times 3\% = 12\%$$

$$\frac{1}{1} \times 3\% = 3\%$$

Assuming that the midpoint of this possible range of growth rates (7.5%) represents the most likely possible combination, this per annum growth rate in capital and surplus represents a compounded incremental impact of 43.6 percent after five years and 106.1 percent after ten years. In other words, a new casualty company's capital and surplus position would be from 44 to 106 percent higher than it would be without the tax differential or shelter after five and ten years respectively. Consequently, the tax differential can offset a sizable portion of the surplus drain associated with young property and casualty insurers and, hence, increase their capacity.

For life insurers, a ratio of new business to renewal business of more than 25 percent will cause surplus to decrease, if reinsurance is not employed. As Pfeffer [22] has emphasized conceptually, the surplus requirements for growing companies are difficult to satisfy in the early years regardless of the volume of initial financing (p. 418). As noted earlier, Leverett [16] has proven the Pfeffer thesis in a more empirically sound manner using simulation analysis. Given the more adverse impact of expensing first year policy acquisition costs for life insurers, the implication of the tax differential or shelter demonstrated above would be even more important for life firms than for property and casualty. For example, the case life company's capital and surplus was 33.14 percent higher due to the favorable tax differential than it would have been otherwise (Exhibit 6, p. 2).

In summary, we have demonstrated (a) the reality of barriers to entry (scale economics and capital requirements )in the insurance industry and (b) the financial impact of the law. We can, therefore, conclude that the law does indeed reduce the financial barriers to entry. As was noted earlier, reducing the average operating expense curve also makes it possible for the fledgling insurance company to reach an optimal size earlier in its life cycle. Cummins et al. [5] have demonstrated the



element of strong concentration in the life industry and the subsequent need to increase competition. By helping to reduce the barriers to entry, the differential tax increases the competitive state of the insurance markets. Importantly, differential taxes have not kept the large foreign life companies from writing sizable portions of their business in states with such taxes. We would assume that property and casualty companies would follow the same pattern. Hence, it can be concluded that Alabama's differential tax has served a beneficial economic purpose. As we shall see next, other data relevant to the behavior of foreign versus domestic further confirm this hypothesis.

## INVESTMENT BEHAVIOR OF FOREIGN VERSUS DOMESTIC INSURANCE COMPANIES

It was alluded to earlier that the economic rationale and impact of the differential premium tax has been positive. Here we shall see that Alabama's need to achieve economic parity with other states has been well served by the stimulation of the intrastate insurance industry. Domestic insurance firms tend to invest a far larger percentage of their admitted asset base in Alabama than their foreign counterparts. Exhibit 7 dramatically illustrates this behavioral phenomenon. In 1981, domestic life companies reported Alabama investments of 34.66 percent of their total admitted amounts whereas domestic property and casualty invested 27.20 percent. In contrast, foreign life insurers invested a mere 1.19 percent of their admitted assets in Alabama. Even though the percent of foreign investments in Alabama approximate the relative percent of premiums written in Alabama (Exhibit 7), it does not negate the much larger relative impact of the domestic companies versus the foreigns. Indeed, the proportional relationship between foreign premiums and Alabama investments may well be attributed to the "relief" feature of the differ-

ential tax which reduces the differential 0.1 percent for every 1.0 percent of Alabama assets per total admitted assets up to a maximum reduction of 1.0 percent. Alabama Insurance Department records report that slightly over 200 foreign insurers qualified for premium tax reductions in both 1979 and 1980. Certainly, the objective of enhancing the state's economic profile is being met with the differential premium tax. Importantly, its relief feature is consistent with the overall goal of increasing capital investment in Alabama.

Of even greater potential impact upon the state's economy are the comparative banking habits of the foreign and domestic insurance companies. Exhibit 8 documents these relative behavioral trends. Of the $825.9 million bank deposits reported at year-end 1981 by the largest foreign life and property and casualty companies, only $1.4 million was placed in Alabama banks. That represents a mere 0.16 percent in Alabama. In sharp contrast, Alabama's ten larget life and property and casualty insurers had $23 million in Alabama banks or 83.7 percent of their total deposits. The multiple effect on deposits held by local institutions upon local, intrastate economies is highly significant and shows the further wisdom of stimulating the intrastate insurance industry through a tax shelter such as the premium differential tax. Indeed, the 17.3 to 1 ratio of domestic deposits to foreign deposits speaks volumes in the economic equation justifying the rationale and impact of the tax shelter being analyzed.

The conclusion is further enhanced upon consideration of the jobs and payrolls which the headquarters operations of Alabama's domestic companies. Data furnished by only 15 such companies is illustrated in Exhibit 9. As shown dramatically therein, these 15 operations provided 2,671 jobs and injected $43.7 million into the Alabama economy during 1981 alone. Keep in mind that the great majority of these economic benefits are marginal



or incremental in nature and given the commonly known multiplier effect, the cumulative benefit to the state's economy of the domestic insurance industry is seen to be immense. Importantly, it is also countercyclical due to the nature of the service areas which make up the insurance industry and should prove stabilizing to Alabama's economy.

In summary, the incremental payrolls, investments, and bank deposits of the domestic industry blend together to make an extraordinariiy beneficial contribution to the state's economic health and future growth potential. Having noted the favorable economic impact of a viable home insurance industry both conceptually and empirically, let us now look at the respective market segments served by foreign versus domestic insurers.

## COMPARATIVE POLICY TYPES AND DISTRIBUTION SYSTEMS OF FOREIGN AND DOMESTIC INSURANCE COMPANIES

In this section, we shall examine briefly the comparative policy types and distribution of agents for foreign versus domestic insurance companies. Exhibit 10 illustrates the total amount of premiums written by the ten largest domestic and foreign life companies. Although it would appear that the domestics are approximately equal to the foreigns in terms of total premiums written ($275.05 million to $279.88 million), this result is weighted heavily by Liberty National's $151.7 million. Still, the viability of the domestic market is clearly evident.

Exhibit 11 which was derived from Exhibit 10 shows the percentage breakdown in lines both by company and totals for domestics and foreigns. The foreign insurers write a mix of 54 percent life to 46 percent accident and health compared to a 67/32 percent breakdown for domestic. Secondly, domestics write 28.5 percent of life totals in industrial forms versus only 6.4 percent respectively for foreign companies. In a similar vein, foreigns

write 31.9 percent of life totals in group insurance versus only 9.4 percent for domestics, with Protective Life the major domestic participant in this market (Exhibit 10). Of additional interest are the large differences in policy mix between domestic companies. It is an inescapable conclusion that domestic life companies are serving different market segments overall than their foreign life counterparts.

This latter conclusion is further substantiated by comparing the average policy sizes for domestics versus foreign life companies. Exhibit 12 illustrates the data base from which these calculations were made with Exhibit 13 containing the resulting average policy sizes. First, foreign life insurers write much larger ordinary life policies than domestic insurers ($16,224 versus $10,949 on the average respectively, Exhibit 13). This difference would be even greater if Independent was not included in the calculation. Provident's average ordinary policy in force in Alabama is $31,201. Although data was not available from the Alabama Insurance Department to calculate Metropolitan's average, a recent Wall Street Journal article reported that, ". . . it has all but ended the home collection of premiums that once made insurance an easy buy for millions of modest-income policyholders" (*Wall Street Journal*, December 30, 1981, p. 9). The giant mutual life insurer has placed its debit agents on commission and introduced new whole-life policies with a $25,000 minimum face value.

Likewise, both group and industrial policies are much smaller for Alabama's domestic insurers than the ten largest foreign companies (Exhibit 13). Only credit life policies issued by domestics are larger than foreign issued policies. These data, like the policy types, further confirm that domestic life companies are emphasizing different market segments than their foreign counterparts.

Given the smaller policy sizes and greater proportion of industrial policies, a reasonable hypothesis would be



that the domestics have placed greater emphasis upon the rural areas of the state with their lower income levels.

A further analysis was performed using Alabama Department of Insurance reports on licensed agent dispersion of the ten largest foreign and domestic life and property an casualty companies per county. Exhibit 14 contains the results of this enumeration.

In the most urbanized counties in the state (Calhoun, Colbert-Lauderdale, Etowah, Houston, Jefferson, Madison, Mobile, Montgomery, Morgan, and Tuscaloosa), the ten largest foreign life insurers had 69.5 percent of their agency force. In contrast, the ten largest domestics employed only 49.0 percent of their respective agents in these same urbanized counties. Although there were almost an equal number of agents for the two groups (3,761 for domestic life companies and 3,806 for foreign life companies), there were 1,943 domestic agents in rural counties versus 1,138 foreign agents.

Considering the agency force dispersion in light of the difference in product mix and average policy sizes described above, it seems evident that the foreign life insurers have emphasized more urban and affluent market segments than their domestic counterparts. This suggests that Alabama's insurance market is in all likelihood less attractive nationally to the large foreign insurers than other more urban, affluent sectors of the country. The greater propensity of domestic insurers to service such markets provides further confirmation that the tax policy is warranted.

Recall that the premium tax differential has earlier been shown to perform the function of enhancing the competitive profile of the insurance markets theoretically vis a vis reducing the barriers to entry. Secondary data were used to demonstrate conceptual need for a tax shelter and the financial reality which such a shelter

affords new insurance companies. In addition, the study has illustrated the incremental economic benefits derived from domestic home office payrolls and the greater propensity of domestic insurers to both invest and place their bank deposits within the state. Now, further evidence has been presented demonstrating conclusively that domestic insurers have emphasized the less urban and affluent sections of the state to a much greater extent than their foreign counterparts. We should, therefore, expect that the level of insurance per Alabamian has risen proportionately more than other sections of the country reflecting an even further and equally important benefit to the state's long-term economic vitality.

As illustrated in Exhibit 15, this latter hypothesis is indeed valid. The average amount of insurance in force per family in Alabama has increased from $5,600 in 1955 to $39,500 in 1980. This reflects a rise in the percent of Alabama insurance in force per family relative to the United States from 81.2 percent to 95.2 percent. Not all of this increase can be attributed merely to the higher relative level of personal income of Alabamians over this period. For instance, Alabama's per capita insurance in force was 91.3 percent of the United States average in 1980; but personal disposable income for Alabamians was only 79.8 percent of the United States level. Clearly, the different policy types and distribution systems emphasized by Alabama's domestic insurance companies versus the foreign companies have played vital roles in raising the insurance coverage of Alabamians over the past three decades.

## CONCLUSIONS

To conclude, the state's differential premium tax was demonstrated to have both a sound theoretical or conceptual and empirical basis. The relationship of barriers to entry and, hence, the competitive state of a market is a well recognized economic concept. The insurance market is characterized by significant barriers to entry,



more specifically scale economies and large capital requirements. Both of these barriers were demonstrated to be valid aspects of the insurance industry.

The theoretical impact of the differential premium tax was proven to be beneficial to reducing each barrier. More specifically, the specific financial benefit of the tax shelter upon domestic firms was illustrated. The heavy capital needs of young, growing insurance companies were emphasized. This was accompanied by an additional demonstration that the tax was not detrimental to the level of foreign insurer competition in differentially taxed states nor onerous to them financially.

Having demonstrated the economic rationale underlying the differential tax, the analysis then turned to identifying the more visible economic benefits of a viable domestic insurance industry. The much greater propensity of domestic companies to both invest in Alabama assets as well as place their bank deposits in Alabama banks provides highly significant incremental benefits arising from the domestic insurance industry. In a similar vein, incremental home office employment and, hence, payrolls were documented and cited as having a multiple effect of a countercyclical nature in an economy where it is currently much needed.

Lastly, the benefit for Alabama consumers of greater and more varied insurance coverage was documented as having partially arisen from the growth of a domestic insurance industry. The domestic companies were shown to have emphasized the more rural, less affluent market segments than their foreign counterparts. This was demonstrated by comparing the types of relative coverage written by foreign and domestic insurers as well as illustrating the smaller average policy sizes and the more rural agency force dispersion of domestic versus foreign insurers. As a final note, the relative rise in insurance coverage for Alabama family units over the past three decades was documented and demonstrated to have paral-

lelled the different marketing thrusts of the domestic life insurers.

In essence, the rationale for the Alabama differential premium tax was analyzed from an economic perspective. It was shown to have a sound basis conceptually or theoretically. Moreover, this rational concept has sufficient data to support its empirical validity. And, most importantly, this public policy has achieved the following economic results or incremental benefits to the public: (a) a more responsive and competitive insurance marketplace, (b) a significantly higher level of secondary investments and deposits wthin Alabama, and (c) additional jobs and, hence, payrolls of a countercyclical nature with strong multiple effects within the state's economy.

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[Exhibits 1-15 to Exhibit 1 to Second Affidavit of George A. Overstreet, Jr., Ph.D. appear as item (4) in Volume II of this Joint Appendix.]



IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

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Civil Action No. 81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, et al.,
*Intervenors.*

[Filed May 5, 1982]

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**[DEFENDANT'S] RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant responds to plaintiff's Motion for Summary Judgment by saying that plaintiff is not entitled to a summary judgment for the following reasons:

1. As a matter of law the statute in question does not contravene either the Constitution of the United States or the Constitution of the State of Alabama.

2. According to the facts before the Court, defendant is entitled to a summary judgment in his favor.

3. Plaintiff states in its motion that it is offering factual support for its motion but plaintiff failed to file its affidavits with its motion pursuant to Rules 56 and 6(d), Alabama Rules of Civil Procedure. Therefore, no facts are due to be considered in *support* of plaintiff's motion.

4. Attached to (as Exhibit "A") and made a part of Defendant's Response to Plaintiff's Motion for Summary Judgment in Civil Action No. CV-81-996-Th is a Second Affidavit of George A. Overstreet, Jr., Ph. D. Defendant hereby incorporates by reference herein the said Second Affidavit.

/s/ Phillip E. Stano
PHILLIP E. STANO

/s/ Warren B. Lightfoot
WARREN B. LIGHTFOOT

/s/ E. Mabry Rogers
E. MABRY ROGERS
Attorneys for Defendant

[Certificate of Service omitted]



IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. 81-994-Th & V-81-996-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Plaintiff,*

vs.

THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, et al.,
*Intervenors.*

[Filed May 5, 1982]

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**DEFENDANT/INTERVENORS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant/Intervenors respond to Plaintiff's Motion for Summary Judgment by saying that Plaintiff is not entitled to a Summary Judgment for the following reasons:

1. As a matter of law the statute in question does not contravene either the Constitution of the United States or the Constitution of the State of Alabama.

2. According to the facts before the Court, Defendant/Intervenors are entitled to a Summary Judgment in their favor.

3. Plaintiffs states in its motion that it is offering factual support for its motion but Plaintiff failed to file its affidavits with its motion pursuant to Rules 56 and 6(d), Alabama Rules of Civil Procedure. Therefore, no facts are due to be considered in *support* of Plaintiff's motion.

4. Attached to Defendant's Response to Plaintiff's Motion for Summary Judgment in Civil Action No. CV-81-996-Th as Exhibit "A" is a Second Affidavit of George A. Overstreet, Jr., Ph. D. Defendant/Intervenors hereby incorporate by reference herein the said Second Affidavit.

/s/ Robert W. Bradford, Jr.
ROBERT W. BRADFORD, JR.,
Attorney for Defendant/
Intervenors

OF COUNSEL:

HILL, HILL, CARTER, FRANCO,
COLE & BLACK
Post Office Box 116
Montgomery, Alabama 36195
(205) 834-7600

[Certificate of Service omitted in printing]



IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

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CIVIL ACTION NO. CV 81-994 Th.

METROPOLITAN LIFE INSURANCE COMPANY,
a New York Corporation,
*Appellant/Plaintiff,*

v.

HONORABLE THARPE FORRESTER, as Commissioner of
Insurance of the Department of Insurance
of the State of Alabama,
*Appellee/Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GURANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation,

*Intervenors.*

[Filed May 5, 1982]

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**AFFIDAVIT**

WILLIAM J. HOWARD being duly sworn according to law deposes and says as follows:

1. I am an Associate General Counsel of Metropolitan Life Insurance Company and make this affidavit in connection with premium tax litigation involving the Company currently pending in the State of Alabama and, more specifically, in support of the Company's Motion for

Summary Judgment in that litigation. I have been employed by Metropolitan Life Insurance Company since February of 1966 and am generally familiar with the Company's business and insurance operations.

2. Metropolitan Life Insurance Company is a mutual life insurance company duly organized and existing under the laws of the State of New York. The Company is now and was at all times material to the instant litigation duly qualified and licensed under the laws of the State of Alabama to engage in the life insurance business therein. Metropolitan Life Insurance Company is a "foreign insurer" under the provisions of § 27-4-1(2) and § 27-4-4 of the Code of Alabama, 1975, as amended.

3. For the years 1977, 1978, 1979 and 1980, Metropolitan Life Insurance Company paid net premium taxes under the provisions of § 27-4-4 of the Code of Alabama, 1975, as amended, in the following amounts for which refunds are claimed in this proceeding:

| Year | Net Premium Tax Paid |
|---|---|
| 1977 | $1,238,153.89 |
| 1978 | 1,367,744.24 |
| 1979 | 1,443,394.19 |
| 1980 | 1,382,989.74 |

True copies of the Company's premium tax statements (with amendments, where appropriate) are attached hereto as Exhibits 1 through Exhibit 5, respectively.

4. Metropolitan Life Insurance Company filed petitions for refund for taxes paid pursuant to § 27-4-4 of the Code of Alabama, 1975, as amended, for the years indicated above pursuant to § 27-4-11 of said Code. These petitions were filed within the time prescribed by law and were denied by the Commission of Insurance on July 8, 1981.

5. If Metropolitan Life Insurance Company had been a life insurance company organized and existing under



the laws of the State of Alabama with its principal office and chief place of business in the State of Alabama, it would have been a "domestic insurer" under the provisions of § 27-4-1(3) of the Code of Alabama, 1975, as amended, and it would have been subject to a lesser tax burden under the provisions of § 27-4-5 of said Code. In the summary that follows, the amounts in column (a) represent the net premium taxes actually paid to the State of Alabama by the Company at the foreign company premium tax rates for which the Company qualified, the amounts in column (b) represent the net premium taxes the Company would have paid to the State of Alabama if it had been taxable at the premium tax rates applicable to domestic insurers (assuming that amounts credited against gross premium taxes in determining net premium taxes remain the same as the amounts credited in determining net premium taxes at foreign company rates), and the amounts in column (c) represent the additional premium tax burden or penalty imposed on the Company by virtue of its being treated as a foreign insurer for premium tax purposes in the State of Alabama.

| Year | (a) Net Premiums Tax Foreign Company Rates | (b) Net Premium Tax Domestic Company Rates | (c) Premium Tax Penalty of Foreign Insurer [(a)-(b)] |
|---|---|---|---|
| 1977 | $1,238,153.89 | $435,616.48 | $802,537.41 |
| 1978 | 1,367,744.24 | 484,786.35 | 882,957.89 |
| 1979 | 1,443,394.19 | 532,782.16 | 910,612.03 |
| 1980 | 1,382,989.74 | 492,946.58 | 890,042.56 |

6. For all years relevant to these proceedings, Metropolitan Life Insurance Company marketed a full range

of life insurance products, including individual and group life insurance policies, health insurance policies (including disability insurance and accident and sickness insurance), and annuity contracts. There are no copyright or patent laws which are applicable to insurance contracts, forms, marketing technique, or marketing plans. Any new insurance program, service or market technique developed by one company is generally quickly known and replicated by competing companies if the policy, service or marketing technique proves to be beneficial to the originating company. In Alabama and elsewhere, the Company competes for the same business and in the same markets as other insurers, including Alabama domestic life insurers selling the same or similar product lines.

7. State premium taxes are generally taken directly into account by the Company in establishing premium rates for group policies and contracts. Thus, if the Company qualifies for a lower premium tax rate, it can offer lower group premiums. If in pricing a group policy two insurers use the same expense and risk charges while one illustrates on the basis of a lower premium tax rate than the other, the company illustrating on the basis of the lower premium tax rate has a distinct competitive advantage at least from a pricing standpoint. In a state like Alabama where the premiums of foreign life insurance companies are taxable at two to three times more than are the premiums of domestic life insurance companies, Alabama domestic life insurance companies always enjoy the aforementioned pricing advantage.

8. Across the State of Alabama, Metropolitan Life Insurance Company has fourteen sales offices and, during the years relevant to these proceedings, employed between 250 and 277 people locally. Sales representatives are full-time common law employees of the Company who are licensed to sell various of the Company's products. With the exception of clerical employees, the compensation and



fringe benefits of other Alabama employees are directly related to sales performance.

9. Metropolitan Life Insurance Company does business in all fifty states and in Canada. In conducting its life insurance business, the Company is subject generally to the New York Insurance Law and, in varying degrees, to the insurance laws in the various states in which it does business. The Company's business is, therefore, interstate in nature and highly regulated. Consequently, the Company cannot necessarily always structure its business affairs solely to the advantage of the laws of any particular state, the State of Alabama included.

10. In addition to the premium tax imposed under § 27-4-4 of the Code of Alabama, 1975, as amended, Metropolitan Life Insurance Company was subject to a variety of other taxes and fees in Alabama. Other taxes and fees which the Company paid in the years in issue include:

| Tax or fee | 1977 | 1978 | 1979 | 1980 |
|---|---|---|---|---|
| Agents' license fees | $ 301 | $ 274 | $ 380 | $ 501 |
| Departmental fees | 60 | 65 | 60 | 70 |
| Company license fees | 201 | 201 | 201 | 201 |
| Municipal license fees | 14,570 | 13,394 | 15,053 | 15,342 |
| Property taxes | 829 | 993 | 920 | 1,327 |
| Sales/use taxes | 5,829 | 7,297 | 7,351 | 9,637 |
| State unemployment taxes | 7,826 | 22,758 | 25,071 | 16,386 |
| Permit fees | 100 | 100 | 100 | 100 |
| Franchise taxes | 1,627 | 1,297 | 1,405 | 1,213 |
| Total | $31,343 | $46,379 | $50,550 | $44,777 |

11. As a large mutual insurance company operating throughout the United States and Canada, Metropolitan Life Insurance Company has as its basic investment objective the achievement of maximum rates of return for policyholders commensurate with safety and liquidity needs and consistent with the health and growth of the national economies. This requires the maintenance of a diversified portfolio of investments, avoiding undue concentration of holdings in any one investment vehicle, industry, company, or geographic region. In recent years, the investment markets in which the Company participates have been characterized by volatility of rates and financing volumes with so-called "windows" in the financial markets requiring rapid investment decisions. Concurrent with this climate of volatility has been intense competition for investment funds and outlets with many financial institutions crossing traditional lines to compete for the savers' dollar and the required investment outlets for these funds. Closely related to these developments have been the growing need for asset/liability management and shrinking lead times between initiation of financial negotiations for the commitment of funds and the actual takedown of an investment. Under such market conditions, a financial institution cannot afford to await investment opportunities in a particular state merely to benefit from a reduced premium tax rate. The opportunity cost would be too great. Even though the Alabama taxing statutes do provide that foreign companies may reduce their premium tax rate by investing a certain percentage of their assets in Alabama investments, because of the nature of the insurance business it is impracticable for companies to make investments in any specific geographic area in order to achieve a tax rate reduction, and in fact, the Company does not consider the so-called Alabama investment incentive provision when making investment decisions. Moreover, within Metropolitan Life Insurance Company, personnel who handle



compliance with premium tax return filing requirements are not involved in the Company's investment operations.

/s/ William J. Howard
WILLIAM J. HOWARD
Associate General Counsel

[Subscription omitted in printing]

[Certificate of Service omitted in printing]

[Exhibits 1-5 to Affidavit of William J. Howard appear as item (5) in Volume II of this Joint Appendix.]

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

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Civil Action No. 81-996-Th

THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation, *et al.*,
*Intervenors.*

[Filed May 5, 1982]

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**AFFIDAVIT OF DAVID H. FREDERICKS**

STATE OF NEW JERSEY )
) ss
COUNTY OF ESSEX )

**AFFIDAVIT**

Comes now David H. Fredericks, who being by me first duly sworn, doth depose and state as follows:

My name is David H. Fredericks. I am and have been for eleven years the Secretary of Prudential Property and Casualty Insurance Company, and I am generally



familiar with all aspects of the operation of the Company's business.

Prudential Property and Casualty Insurance Company is a corporation duly organized and existing under the laws of the State of New Jersey and is now, and was at all times material to the instant litigation, duly qualified and licensed under the laws of the State of Alabama to engage in the property and casualty insurance business in the State of Alabama.

Prudential Property and Casualty Insurance Company is a "foreign insurer" under the provisions of § 27-4-1(2) and § 27-4-4 of the Code of Alabama, 1975, as amended.

Prudential Property and Casualty Insurance Company has heretofore paid $126,125.87 in premium taxes for the year 1977 under the provisions of § 27-4-4 of the Code of Alabama, 1975, as amended. A copy of the Company's premium tax return is attached hereto as Exhibit 1.

Pursuant to § 27-4-11 of the Code of Alabama, 1975, as amended, Prudential Property and Casualty Insurance Company filed a petition for refund of 1977 taxes paid pursuant to § 27-4-4. This petition was filed within the time prescribed by law and was denied by the defendant on July 8, 1981.

If Prudential Property and Casualty Insurance Company had been an insurance company organized and existing under the laws of the State of Alabama and maintained its principal office and chief place of business in the State of Alabama, it would have been subject to a lesser tax burden under the provisions of § 27-4-5, Code of Alabama, 1975, as amended since it would have been a domestic insurer under § 27-4-5 and § 27-4-1(3), Code of Alabama, 1975, as amended. The Company's premium tax liability, computed as if the Company had been taxed as a domestic property and casualty insurer for the

year 1977, is set forth in Column (b) on the chart set out below.

| | (a) Taxes actually paid at foreign rate | (b) Taxes Company would have paid if taxed at rate equal to domestic company | (c) Penalty for being a "foreign insurer" in Alabama (a)-(b) |
|---|---|---|---|
| 1977 | $126,125.87 | $31,444.47 | $94,681.40 |

The tax liability set out in Column (b) was computed by taking data directly from copies of the tax return as actually filed by the Company and recomputing the liability as if the Company were a domestic insurance company.

The figure in Column (c) represents the additional tax burden imposed on the Company by virtue of being treated as a foreign insurer under Alabama tax law.

Prudential Property and Casualty Insurance Company is licensed to engage in the property and casualty insurance business in all states (including the District of Columbia) except Wyoming. In Alabama, the Company sells the following types of insurance: fire, allied lines, homeowners, inland marine, earthquake, other liability, auto bodily injury, auto property damage, auto collision and auto comprehensive. Similar products are offered by companies competing in similar segments of the market in Alabama regardless of the place of domicile of the individual company. There are no copyright or patent laws which are applicable to insurance contracts, forms or marketing techniques. Any new insurance program, service or marketing technique developed by one company is generally quickly known and replicated by competing companies if the program, service or marketing techniqne proves to be beneficial to the originating company.

The Company's business is subject to the regulatory systems of its home state, New Jersey, and every other



jurisdiction in which it does business. Accordingly, the Company is not free to structure its business affairs or transactions solely to meet the requirements of any one state.

Prudential Property and Casualty Insurance Company is subject to a number of taxes and fees in the State of Alabama in addition to the gross premium tax imposed by § 27-4-4. Such taxes and fees include franchise taxes, license fees, examination fees and annual statement filing fees.

At this point perhaps some special remarks are in order concerning the Company's investment philosophy and its ability to react to the so-called investment incentives which are a part of the Alabama Premium Tax Law. Historically, the investment philosophy of Prudential Property and Casualty Insurance Company has been to maintain a high degree of flexibility to shift funds from one type of security to another to meet changing investment demands.

The flexibility that the Company seeks in making investments has been achieved within a framework of legal regulation and fairly conservative policies of investment. In order to understand the geographic investment patterns of the Company, one must be aware of the distinction between the accumulation of reserves and the investment of these reserves. In this Company, two separate groups of personnel handle these operations. Our insurance policies are not sold in any geographic area because of the potential investment outlets in that area. Similarly, investments are not made because of the amount of insurance sold in a particular area, but on the basis of the quality and yield of the security or investment. In other words, when making investment decisions, the Company is primarily guided by considerations of safety and yield.

The importance of safety arises from the fiduciary nature of the relationship between an insurance company

and its policyholders. The company must be able at all times to fulfill its part of the contract. Reserves must be invested in securities where there is a reasonable assurance that the principal can be returned intact. This is a necessary facet of the insurance business generally. Yield is important because the more an insurance company earns on its portfolio, the less it needs to charge for insurance protection.

A key to maximizing the safety and yield of the Company's investments is our policy of diversification. It is a common principle of investment that spreading (or diversification) of risk over a large number of investments tends to minimize the chances of large losses. There are several ways in which the Company achieves diversification in its investment activity. We diversify by geographic location and also by type of security.

In summary then, it can be safely stated that the investment policies of this Company necessarily place great emphasis on safety and yield characteristics of investment opportunities. Geographic diversification is an essential component of assuring the safety of our investment portfolio. In striving for geographic diversification, no special treatment has been given to any specific region or state. Moreover, it can be said with certainty that the investment incentive which is a part of the Alabama taxing provision has had no impact or influence on this Company's investment decisions.

/s/ David H. Fredericks
DAVID H. FREDERICKS
Secretary

[Subscription omitted in printing]

[Exhibit 1 to Affidavit of David H. Fredericks appears as item (6) in Volume II of this Joint Appendix.]



IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-996

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation,
*Appellant/Plaintiff*

vs.

HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Appellee/Defendant*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation,

*Intervenors*

[Filed May 5, 1982]

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**AFFIDAVIT OF**
**ALFRED E. HOFFLANDER, Ph.D.**

Before me the undersigned authority in and for said County in said State personally appeared Alfred E. Hofflander, who being by me first duly sworn deposes and says:

1. My name is Alfred E. Hofflander. I am employed by the Graduate School of Management at UCLA as Professor of Finance and Insurance. I reside at 1725-C Selby Avenue, Los Angeles, California. Attached as Exhibit A to this affidavit is a copy of my resume, reflecting my education, training, experience and qualifications.

2. At the request of counsel for the plaintiff I made an analysis of the economic effects and purported purposes of the discriminatory tax imposed by Alabama on foreign insurance companies doing business in Alabama. Attached as Exhibit B to this affidavit is the result of this study. The analyses, conclusions and opinions reflected in Exhibit B are my own.

3. In preparing this economic analysis, I have drawn upon my academic background in finance and insurance, previous research on state taxation of insurance companies, and accepted principles of economics. In addition, I have conducted some empirical work on the Alabama insurance industry and the state taxation of domestic and foreign insurance companies in Alabama.

4. All publications cited in Exhibit B are in my opinion authoritative, standard and trustworthy. All insurance industry data are taken from standard sources, all population and economic data are drawn from standard government sources, and both represent to the best of my judgment the best available evidence on the subjects in question.

/s/ Alfred E. Hofflander
ALFRED E. HOFFLANDER

[Subscription omitted in printing]

[Certificate of Service omitted in printing]



**EXHIBIT A:**

**BIO-BIBLOGRAPHY OF**
**ALFRED E. HOFFLANDER, PH.D.**

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**BIO-BIBLIOGRAPHY OF**

DATE: April 21, 1982

NAME: Alfred Edward Hofflander

UCLA OFFICE: Graduate School of Management, Room 5212

CAMPUS PHONE: 825-2445/825-2507

HOME ADDRESS: 1725-C Selby Avenue, Los Angeles, CA 90024

SPOUSE'S NAME: Betty Toler Hofflander

BIRTHDATE: May 31, 1936

BIRTHPLACE: Chicago, Illinois

DEGREES

| | |
|---|---|
| B.S. | 1958 Florida State University, Physics and Mathematics |
| M.S. | 1959 Florida State University, Finance |
| Ph. D. | 1964 University of Pennsylvania, Economics (Insurance) |
| C.L.U. | 1966 Insurance, American College of Life Underwriters |
| C.P.C.U. | 1966 Insurance, American Institute for Property and Liability Underwriters |

WORK EXPERIENCE:

1957-1959 Florida State University, Instructor in Physics

1958-1959 Florida State University, Instructor in Finance

1959-1960 North Florida Junior College, Instructor in Business

1963-1966 The University of Texas, Assistant Professor of Finance and Insurance

UCLA FACULTY APPOINTMENT:

Assistant Professor, Step IV, 7/1/66

Associate Professor, Step I, o/s, 7/1/68

Professor, Step I, o/s, 7/1/72

Professor, Step IV, o/s, 7/1/80

TEACHING:

a) Courses Taught in GSM:

Mgt. 403 Statistics

Mgt. 408 Managerial Finance

Mgt. 135 Principles of Insurance

Mgt. 233B Management of Financial Institutions

Mgt. 236 Life Insurance in Business and Estate Management

Mgt. 235A Problems in Insurance Management

Mgt. 235B Risk & Risk Bearing

Mgt. 237 Property and Casualty Insurance in Business Management

Mgt. 238 Seminar in Finance and Insurance

b) Teaching Performed within the University in Addition to Regular Appointments:

1. Executive Education, 1976, 1977, 1978
2. Y.P.O., 1981-



c) Outside Teaching Activities:

None

CHAIRMANSHIPS OF DOCTORAL COMMITTEES:

a) Degrees Granted and Current Status:

1. Richard Spiller, 1971, Professor, California State College, Long Beach, California.
2. Leonard Berekson, 1972, Associate Professor, University of Nebraska.
3. John Markle, 1972, Head, Government Bond Section, Salomon Brothers, Dallas.

b) Students Advanced to Candidacy:

None

c) Guidance Committees:

None

CHAIRMANSHIPS ON MASTER'S THESIS COMMITTEES:

None

MEMBERSHIP ON DOCTORAL AND MASTER'S THESIS COMMITTEES:

Doctoral:

1. John Mitchel, GSM, 1967, Accounting
2. Nan-Chang Paul Hsieh, GSM, 1969, Quantitative Methods.
3. Samuel Webb, Public Health, 1967.
4. Joseph Launie, GSM, 1968, Insurance.
5. David Hitchcock, GSM, 1969, Quantitative Methods.

6. John Schreiner, GSM, 1969, Finance.
7. Gary Tuchman, GSM, 1970, Finance
8. Robert Trout GSM, 1978, Finance

Masters:

None

COMMITTEE SERVICE:

a) Committees of the Academic Senate:
   1. Extension Committee, 1974-75
   2. Budget Council 1975-78
      Chairman, 1977-78
   3. Executive Committee, 1977-78

b) Administrative Committees:
   1. Numerous (ex officio), 1970-73.

c) College, Departmental or Other University Committees:
   1. Staffing Committee, 1967-70, 1978-80
      Chairman, 1968-69
   2. Academic Evaluation Criteria Committee, 1968-69.
   3. Research Committee, 1968-69.
   4. Executive Committee, Department of Management, 1970-73.

d) Other Committees:
   1. Committee/Panel UCRS—Social Security Coordination, 1976.
   2. Special University-wide Committee to examine U.C. Tax deferred Annuity Program, 1975-76.
   3. Special University-Wide Committee to examine Risk Management function of the University, 1977-78.



SPECIAL APPOINTMENTS:

a) Administrative Posts Held, Department Officers, etc.
   1. Vice Chairman, Department of Management, 1970-71.
   2. Chairman, Department of Management, 1971-73.
   3. Assistant Dean, Doctoral Program, 1974-75.

PROFESSIONAL ACTIVITIES:

a) Consultative or Similar Service to Civic, State or National Governmental Agencies:
   1. Consultant, Texas Board of Insurance, 1965.
   2. Consultant, State of New York Insurance Department, 1967.
   3. Consultant, State of California Legislature, Joint Committee on Medi-Cal, 1968.
   4. Consultant, U.S. Treasury-Impact of Income Tax on Investment in Real Estate by Life Insurance Companies, 1968.
   5. Consultant, U.S. Senate Anti-Trust and Monopoly Sub-Committee, 1968.
   6. Consultant, President's National Advisory Panel on Insurance in Riot Affected Areas, 1968.
   7. Consultant, Department of Transportation Auto Insurance Study Group, Washington, D.C. 1969.
   8. Consultant, State of New Jersey Insurance Department, 1970-71.
   9. Consultant, State of Nevada Insurance Department, 1971-74.
   10. Consultant, State of Oregon Insurance Department, 1974-76.

11. Consultant, Commission on Tax Reform, Commonwealth of Puerto Rico, 1974-75
12. Consultant to the California Citizen's Committee on Tort Reform, 1976-77.
13. Expert Witness Testimony, numerous court cases, 1966-

b) Other Consultative or Professional Activity:

1. Educational Consultant, American Institute of Property-Liability Underwriters, 1967, 1975, 1976.
2. On-going Consultant to UCLA Emeriti Center and UCLA Emeriti on Insurance Problems of the Retired, 1974-
3. Consultant, American College of Surgeons, 1975.
4. Consultant, Los Angeles County Medical Association, 1975-76.
5. Consultant, American Board of Nuclear Medicine, 1975-76.

c) Participation on Public Lectures or Forums:

1. Regional Commencement Address, American College of Life Underwriters, September 1964.
2. "Insurance Applications of Computer Models," University of Montana Computer Seminar, 1968.
3. "Medical Malpractice," A One Day Seminar, the University of Nebraska-Lincoln, 1976.

d) Papers Presented at Professional Societies:

1. American Risk and Insurance Association, Annual Meeting, 1965, 1967-69, 1975, 1976, 1981.



2. Risk Theory Seminar, Annual Meeting, 1966-67, 1969-72, 1976.
3. Western Association of Insurance Professors, Annual Meeting, 1967, 1970.
4. International Insurance Seminar, London, 1967; Tokyo, 1970; Berlin, 1971; Manila, 1978.
5. Risk and Insurance Management Society, 1975, 1976.
6. International Institute of Risk Management Consultants, 1975.
7. Pacific Insurance Conference, 1975.

e) Service to the Staff or Editorial Board of Scholarly Journals or Other Publications:

1. *Journal of Risk and Insurance*, Reviewer, 1964-
   Business Manager, 1964-66
   Assistant Editor, 1966-75
   Assistant Editor and member of the Editorial Board, 1977-79
2. *Annals of the Society of Chartered Property and Casualty Underwriters*, Reviewer, 1964-74.
   Book Review Editor, 1965-66
   Associate Editor, 1965-66
3. *South-West Social Science Quarterly*, Reviewer, 1965.
4. *Management Science*, Reviewer, 1968.
5. *Journal of Financial and Quantitative Analysis*, Reviewer, 1974, 1975.
6. *Journal of Insurance Regulation*—Member of Board of Review, 1982-

f) Membership in Professional Associations and Scholarly Societies:

1. Western Association of Insurance Professors, 1965-

   Secretary, 1966-67

   Treasurer, 1967-68

   Vice President and Program Chairman, 1968-69

   President, 1969-70

2. American Economic Association, 1963-74.

3. American Finance Association, 1963-74.

4. American Risk and Insurance Association, 1963-

   Board of Directors, 1970-77

   Vice President and Program Chairman, 1973-74

   President-Elect, 1974-75

   President, 1975-76

g) Community Service Activities:

1. Office of the Director of Personnel-Rating Panel to fill office of Treasurer/Tax Collector, County of Los Angeles, 1974.

2. Served as Member of the Risk Management Advisory Committee (to the Board of Supervisors), County of Los Angeles, 1974-76, 1977-1980

3. American Association of Emeriti, 1975-76.

4. President, UCLA Faculty Center, 1981-82.

AWARDS AND HONORS:

a) Commendations, Honors, Foreign Decorations, Honorary Degrees:



1. Recipient: National Association of Independent Insurers' Award for outstanding feature article published in the *Journal of Risk and Insurance*, 1966, 1969, 1970, 1977.

2. Elected to the Risk Theory Seminar, 1966-
   Chairman, 1970-71

b) Contracts, Grants, Fellowships:

1. American Risk and Insurance Association, Summer Research Fellowship, $1,300, study of company operations, 1964.

2. American Risk and Insurance Association, two grants—$600, research in portfolio management of insurers (one article resulted in award mentioned in (a), 1965 and 1967.

3. Principal Investigator, University of Texas, two grants totaling $6,000, research on Quantitative Determinants of Income, 1965-66.

4. Principal Investigator, Connecticut Mutual Life Insurance Company, $2,300, to study effect of Anticipated Price Level Changes in Demand for Insurance, 1966.

5. Post Doctoral Research Fellow, Traveler's Insurance Company, $2,400, 1967.

6. American Risk and Insurance Association, $500, study of Ruin Problem in Insurance, 1968.

7. Industrial Indemnity, $16,000, Study of Cumulative Injury Problem, 1977-78.

8. Transamerican Title, $20,000, study of Distribution of Title Insurance in California, 1977.

9. Association of California Life Insurance Companies, $25,000, Comparative Study of Business State Income Tax burdens in California, 1979-80.

RESEARCH IN PROGRESS:

1. Discriminatory Taxation of Insurance Companies.

OTHER RELEVANT INFORMATION:

None

PUBLICATIONS:

a) Books Published:

None

b) Books Accepted for Publication:

None

c) Chapter in Books:

1. Hofflander, A.E., "Minimum Capital and Surplus Requirements for Multiple Line Insurance Companies: A New Approach," 69-94, *Chapter Six of Insurance, Government and Social Policy*, Kimball and Denenberg, (Eds.), 1969.

d) Monographs:

1. Hofflander, A.E. and Zollinger, C.L., *Taxation of the Life Insurance Industry in California*, Association of California Life Insurance Companies, Sacramento (1981).

e) Professional Journal Articles Published:

1. Hofflander, A.E. and Dickerson, O.D., "Loss Distributions in Non-Life Insurance," *The Journal of Insurance*, *28*, 45-54 (1961).

2. Hofflander, A.E., "Loss of Income Due to Wrongful Death: A Method of Measurement," *The Insurance Law Journal*, 92-101, (1965).



3. Hofflander, A.E. and Johnson, H.L., "The Impact of Investment Regulation in the Life Insurance Industry," *The Insurance Law Journal*, 389-396 (1965).

4. Hofflander, A.E., "Salary Scales: An Aggregate Approach," *The Journal of Risk and Insurance*, *32*, 571-578 (1965).

5. Hofflander, A.E., "Expense Ratios, the Business Cycle and the Stock Market," *CPCU Annals*, *19*, 51-64 (1966).

6. Hofflander, A.E., "Losses and Price Theory in Property-Liability Insurance," *CPCU-Annals*, *19*, 1957-164, (1966).

7. Lambert, E.W. and Hofflander, A.E., "Impact of New Multiple Line Underwriting on Investment Portfolios of Property-Liability Insurers," *Journal of Risk and Insurance*, *33*, 209-223 (1966).

8. Hofflander, A.E., "The Human Life Value: An Historical Perspective," *The Journal of Risk and Insurance*, *33*, 381-391 (1966).

9. Hofflander, A.E., "The Human Life Value: A theoretical Model," *The Journal of Risk and Insurance*, *33*, 529-536 (1966).

10. Hofflander, A.E., and Schkade, L., "A Least Cost Rule for Selection of Collision Deductibles," *CPCU Annals*, *20*, 5-19, (1967).

11. Hofflander, A.E. and Duvall, R.M., "The Ruin Problem in Multiple Line Insurance: A Simplified Model," *Journal of Financial and Quantitative Analysis*, *2*, 150-165 (1967).

12. Shelton, J., Hofflander, A.E. and Brigham, E., "An Evaluation Appraisal of Dual Funds," *Financial Analysts Journal*, 131-134, (1967).

13. Hofflander, A.E. and Duvall, R.M., "Inflation and Sales of Life Insurance," *The Journal of Risk and Insurance, 34*, 355-361 (1967).

14. Lambert, E.W., and Hofflander, A.E., "Portfolio Management of Property-Liability Companies," *Financial Analyst Journal, 34*, 1-6, (1967).

15. Hofflander, A.E., Lambert, E.W. and Duvall, E.M., "Optimum Liquidity Levels for Multiple Line Insurance Companies," *Journal of Risk and Insurance, 35*, 199-205 (1968).

16. Hofflander, A.E., "Quantitative Determinants of Income with Some Implications to Insurance," *Journal of Risk and Insurance, 35*, 75-85 (1968).

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1. Hofflander, A.E. and Zollinger, C.L., "California Taxation of Life Insurance Companies," *Journal of Insurance Regulation*, 18 pp., Fall 1982.

g) Professional Journal Articles Submitted:

None

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1. "Inflation and the Sales of Life Insurance in the United States," Pacific Insurance Conference,

(unbound) reprinted in full in trade press, September 1975.

f) Book Reviews:

1. Review of *An Analysis of Prices and Profits in the Property-Liability Insurance Industry*, Hoffander, A.E. and Mason, R.H., in *The Journal of Risk and Insurance*, 293-298 (1968).
2. Review of *Fundamentals of Fire and Casualty Insurance Strength*, in *The Journal of Risk and Insurance*, *35*, 437-439 (1968).
3. Review of *Investment Return and Property-Liability Insurance Ratemaking*, in the *Journal of Risk and Insurance*, *42*, 359-361 (1975).



**EXHIBIT B:**

**TESTIMONY OF ALFRED E. HOFFLANDER, Ph.D.**

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The purpose of this document is to present an economic analysis of the discriminatory tax imposed by Alabama on foreign insurance companies doing business in Alabama.

The major conclusion of this economic analysis and the related research effort is that the discriminatory tax which Alabama imposes on foreign insurance companies operating in Alabama has adverse competitive and economic effects. Furthermore, the tax-reducing investment law is not only ineffectual but also both unreasonable and absurd. The purposes identified by the defendants as the legitimate aims served by the discriminatory law are either inconsistent with the expected economic effects of such a law or contradicted by the evidence.

My analysis indicates that there are alternatives to the discriminatory tax which can provide the same amount of revenue to the State, benefit the interstate business of Alabama's domestic insurance industry, and benefit the economy and consumers of Alabama. Given the negative economic impact of the discriminatory premium tax and the existence of attractive alternatives to such a law, I believe that Alabama would be better served by the elimination of the discriminatory tax.

In order to effectively communicate the methodology and findings of my research, this report is organized into six major sections:

I. Description of the Insurance Industry

II. State Taxation of Insurance Companies

III. Economic Effects of Discriminatory Taxation

IV. Economic Review of Purported Legitimate Purposes of Discriminatory Taxation

V. Analysis of Realistic Alternatives to the Discriminatory Tax

VI. Conclusions

## I. DESCRIPTION OF THE INSURANCE INDUSTRY

The insurance industry is of tremendous economic importance because of its role in capital formation in the United States and because of the important services the industry provides to the public as a whole.

Financial protection of many types is provided to individuals and businesses through insurance. Although regulated intensely by the states, insurance companies compete aggressively in interstate business. The products of insurance are of the nature of financial contracts and thus can be easily transported across state lines. Similar products are offered by companies competing in similar segments of the market, regardless of place of domicile of the individual companies.

The insurance industry is an important source of funds for the capital markets. The major components of insurance company assets are financial investments of various kinds: bonds, mortgages, and stocks. In addition, life insurance companies are a source of investment dollars for real estate. The growth and profitability of an insurance company is a function of the company's success in two areas: (1) its success in writing insurance contracts at a profit and (2) its success in earning a high but safe return on the funds it invests from premiums received from policyholders.

This first section of this document discusses the services and products offered by insurance companies. A brief history of the regulation of the industry is provided, with a specific focus on Alabama. Next, evidence of economic



importance of the industry is then presented. Finally, this section concludes with a description of the insurance industry in Alabama as it exists today.

### The Business of Insurance

The insurance industry is divided into two broad categories: (1) life and health insurance and (2) property and liability insurance (or nonlife). These categories reflect the different types of financial protection which are provided by insurance.

The life and health insurance industry provides three types of protection:

(1) Financial protection against premature death, through life insurance.

(2) Financial protection against the possibility of outliving one's financial resources, through annuities.

(3) Protection against financial burden resulting from disability or extensive medical care, through health insurance.

The property and liability insurance industry provides many forms of financial protection against almost every known peril—fire, windstorm, earthquakes, flood, theft, and collision damage, to name a few. The major types of property and liability insurance provided to individuals are homeowners insurance, which generally provides protection against multiple perils, and automobile liability and damage insurance. Major forms of insurance sold to commercial purchasers of insurance include workers' compensation, automobile insurance, general liability, and commercial multiple peril insurance.

### Life Insurance Products[1]

Whole life represents a major product of life insurance companies. Under a whole life policy, the buyer agrees

[1] Much of this section was taken from *Capital Formation Through Life Insurance* by George A. Bishop, pp. 96-106.

to pay a yearly premium for his whole life while the life insurance company agrees to pay the face value of the policy at the time of the policyholder's death to his beneficiary. The premium payments are level even though the probability of death increases with the age of the policyholder. In the early years of the policy, the amount of premiums in excess of the amount required to cover risk of death is invested and compounded to cover death losses at later ages. Thus, the whole life policy includes a savings element that is built-up over time.

Term insurance does not provide a vehicle for savings. Instead term provides protection for a given period by pooling of the financial costs associated with death. While whole life is characterized by a level premium over the life of the policyholder, the cost of term insurance increases with the age of the policyholder. Although it is relatively inexpensive for young people, it becomes increasingly more expensive with age.

Industrial insurance (or home service life insurance) is characterized by the collection of premiums weekly or monthly at the policyholder's home. It was originally designed to serve the needs of low income policyholders. However, "as a result of increasing income levels, the growing financial sophistication of consumers, and the high cost of collection, industrial insurance has declined in relative terms." [8]

Industrial insurance has been to a large extent replaced by group life insurance which was first introduced in 1911. Group life insurance has been providing a growing source of the life insurance needs of Americans.

Credit life insurance has also been growing rapidly. It is designed to repay a consumer loan in the event of death of the borrower. Insurance companies issue credit insurance through banks, finance companies and retailers.

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[8] Ibid., p. 98.



Another type of product issued by insurance companies are annuities. "An annuity is contract for payment of a regular income to an owner of the contract beginning at a specified time or age and continuing for the remainder of the owner's lifetime." [9]

The advent of significant levels of unexpected inflation created the need for new types of life insurance products. These new products include variable life and universal life.

Insurance products are generally sold direct to potential policyholders through an agent. An agent may be tied exclusively to only one insurance company or may be selling the products of many companies. The cost of marketing insurance products (through traditional distribution channels) is high. Life insurance and accident and health policies are being sold in increasing amounts through group policies sold to employers or other organizations. Obviously, the marketing cost of such group policies is substantially lower. Companies pass on their cost savings to the purchasers of group policies in the form of lower premiums per amount of coverage.

"The business of life insurance is certainly nationwide." [10] A similar statement could be made for the property and liability insurance industry. Mr. Ford, in his dissertation, reported statistics that were originally presented by S.S. Huebner in 1950 which showed that for the twenty leading companies (which at that time transacted nearly 90% of the total ordinary life insurance business in the United States) only 15.5% of the dollar amount of policies in force was located in their home state and

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[9] Ibid., p. 98.

[10] R.A. Ford, "The Regulation of Life Insurance in Alabama," (unpublished Ph.D. dissertation), University of Alabama, 1956, p. 89.

only 12.6% of the total premium income was derived from that state.[8]

Exhibit I reflects the extent of interstate business engaged in by the life insurance companies with the largest market share in Alabama. Certainly these companies conduct their business nationwide. The Alabama companies are writing a significant percentage of their premiums outside of Alabama. The foreign companies which operate in Alabama generate only between 7% and 12% of their business in their home state. The pattern for property-liability insurance companies is quite similar.[9]

In addition to performing different functions, the life and health insurance industry and the property and liability industry "drawn upon different sources of funds and employ their funds somewhat differently in the capital market."[1] Life insurance companies are classified as financial intermediaries because the policies they issue (other than most term and group) have included in the premium a reserve or savings element that represents an amount in excess of the need for current death losses. Premiums are written on the assumption of the life insurance company achieving a minimum rate of return on invested funds. Especially because of the long-term nature of the life insurance contract, safety of investments is an important consideration. As Liberty National Life stated in its 1979 Annual Report, "A fundamental principle of our investment philosophy is to consider safety of principal first and rate of return second. As a result we believe that we have an investment portfolio of

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[8] S.S. Huebner, *Life Insurance*, 4th Edition (New York: Appleton-Century-Crofts, Inc., 1950), p. 480.

[9] Although many of the statements made above are directed at life insurance, similar statements could be made for the property and liability insurance industry.

[1] Herbert E. Dougall and Jack E. Gaumnitz, *Capital Markets and Institutions*, 3rd Edition (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1975), p. 79.



EXHIBIT I

INTERSTATE ACTIVITY OF COMPANIES
WITH SIGNIFICANT MARKET SHARE IN ALABAMA

| Company | Place of Domicile | Market Share in Alabama (1979 life premiums) | Total Life Premiums Written in U.S. (millions) | % of Total Premiums Written in State of Domicile | Number of States Licensed in |
|---|---|---|---|---|---|
| Liberty National | Alabama | 18.3% | $ 2754 | 38.1% | 41 plus D.C. |
| Metropolitan Life | New York | 6.6% | 44213 | 12.5% | 38 plus D.C. |
| Prudential | New Jersey | 5.6% | 74259 | 6.1% | 38 plus D.C. |
| Protective Life | Alabama | 5.6% | 1043 | 89.6% | 44 plus D.C. |
| New York Life | New York | 5.6% | 23884 | 6.1% | 38 plus D.C. |
| Equitable Life | New York | 5.1% | 41860 | 12.5% | 38 plus D.C. |
| National Savings Life | Alabama | 3.1% | 224 | 74.5% | 4 |
| Blue Cross Life | Illinois | 2.1% | 2261 | 4.5% | 47 plus D.C. |

Source: 1980 Alabama Insurance Report Basis Life Reports

the very highest quality."[8] To achieve these objectives, life companies restrict investments "to instruments that meet the standards of quality established by policy and regulation. Diversification by type of investment, industrial category, maturity and degree of marketability is also a means of protecting against losses of principal."[9]

The assets of property-liability insurance companies consist mainly of capital market securities. Unlike life companies, they do not collect savings. Investment funds are derived mainly from (1) premium income and (2) increases in policyholders' surplus. Property and liability companies have a much different investment policy from life companies. Because of the greater need for liquidity, assets are invested in short-term instruments such as stocks. While mortgages are important investments for life companies, they are generally not used by property and liability companies.

### Regulation of Insurance Companies

Insurance companies have a long history of regulation by the states. In the case of life insurance companies, extensive regulation has evolved because of the nature of the product and its complexity. Winston Beard cites four reasons for the extensive regulatio nof life insurance:"[10]

(1) Dependence by many on insurance as the only or major provision for old age, so it is the only form of saving by many.

(2) Beneficiary of a life insurance policy is a third party to the contract and has no voice in the management of the company or the terms of the policy.

[8] Annual Report of Liberty National Life Insurance Company, 1970, p. 16.

[9] Dougall and Gaumnitz, p. 82.

[10] Winston C. Beard, "The Financial and Economic Effects of Geographical Restrictions Upon the Investment Policies of Life Insurance Companies" (unpublished Ph.D. dissertation), University of Illinois, 1961, pp. 27-28.



(3) Limited ability of the insured to judge the merits of the policy or company because of complex technical nature of the business.

(4) Long-term nature of the contract creates unusual risks of poor judgment and mismanagement by company executives.

In addition to regulating the actuarial side of the business, states found it necessary to regulate the investments of insurance companies as well.

Regulation of insurance companies dates back to the end of the eighteenth century, and took the form of regulations imposed by the states in the granting of charters. The right of the states to regulate insurance was affirmed by the United States Supreme Court in 1869 when the court ruled that insurance was not "commerce" within the meaning of the Commerce Clause of the United States Constitution.[11] Ford discusses in depth the facts and circumstances surrounding this Supreme Court case as well as later developments and concludes, "For the seventy-five years following the *Paul vs. Virginia* case, it was the accepted practice to regard the general supervision of all forms of insurance as falling completely within the jurisdictions of the state government."[12]

The Supreme Court reversed itself in 1944 when it ruled that insurance was commerce.[13] In the words of the court,

> No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.[14]

[11] *Paul v. Virginia*, 8 Wall. 168; 19 L. Ed. 357.

[12] Ford, op. cit., p. 28.

[13] United States vs. South Eastern Underwriters Association, et al., 322 U.S. 533; 88 L. Ed. 1440.

[14] Ibid., p. 553.

This decision created much uncertainty regarding constitutionality of state statutes regulating and taxing insurance companies. In response, Congress acted quickly to pass in 1945 the McCarran Act (Public Law 15, 79th Congres, 1st Session, 1945, 15 U.S.C. 1011 et. seq.) which stated that regulation and taxation of insurance companies by the states was in the public interest.

Since the McCarran Act the right of the states to regulate and tax insurance companies has been accepted, and cases relating to insurance have not been heard under the Commerce Clause.

The regulation of insurance companies in Alabama dates back to the early 1800's. The first insurance companies were primarily fire and marine. Regulation was instituted through the individual statutes under which these companies were chartered. The first life insurance company was chartered in Alabama in 1840.

Ford provides a detailed discussion of the development of the regulation of insurance companies by Alabama from the early 1800's to the 1950's.[15] Early regulation (through 1868) took the form of restrictive provisions that were added to charters of companies when they were incorporated. Examples of some of the early regulatory requirements that were instituted through individual chartering of insurance companies include the following:

(1) Minimum requirements for capitalization

(2) Requirement that a list of stockholders be kept by the company for inspection

(3) Requirement that a "statement for affairs" of the company be provided to stockholders

(4) Requirement that a percentage of profits be set aside for losses.

[15] Ford, op. cit., pp. 45-82.



(5) Established restrictions on investment practices

In 1868, this practice was eliminated: "Immediately (after the Civil War) it was evident that individual chartering of each life insurance company was not feasible, and in 1868 provisions were set up for the chartering of all insurance companies under general statutes."[16] The first general statute placed practically no restrictions on the forming corporations. It merely established capital requirements, the life of the corporation and the basic requirements for set-up. Major restrictions under these general statutes enacted by the legislature to apply specifically to insurance companies included the following:

(1) Beginning in 1886, required all insurance companies doing business in Alabama to provide an annual statement

(2) Regulation of agents of foreign companies as early as 1859

(3) Special taxation of insurance companies through enactment of the premium tax in 1859 (special taxation of foreign companies ten years earlier)

The next major stage of regulation was what Ford called "the development of administrative control." It was in 1897 that the Legislature recognized the need for some centralized authority over the insurance business. The Secretary of State was given the responsibility for all control, management, and supervision of insurance companies. In 1915, an independent Department of Insurance was created and the position of Commissioner of Insurance established. Various reorganizations and shifting of responsibilities for insurance occurred in 1923 and in 1939.

However, in 1951, the Legislature again established the Department of Insurance as an independent agency within the state, with responsibility for administration of

[16] Ford, op. cit., p. 55.

the laws of the state regulating insurance, the insurance business and insurance companies and their agents. It is, approximately, this structure which still exists.

A number of observations can be made as a result of a perusal of the history of regulation of insurance companies in Alabama and in other states. First, there is a long history of regulation by the states and evolving out of that regulation was the exercise of the state's taxing powers. (This area is discussed in more detail in Section II.) Second, the tradition of state regulation was legitimized with the passage of the McCarran Act. Third, regulation developed to protect policyholders from possible misdeeds by an emerging industry. However, one questions whether the environmental conditions that gave rise to such regulation are still prevalent.

### Economic Importance of Insurance Industry

Insurance companies of all types received in excess of $236 billion in premiums in 1979. About 1.8 million people were employed in the insurance industry in the United States in 1979. The rest of this section provides additional measures of the size and importance of the insurance industry.

### Life Insurance [17]

The life insurance industry has far reaching effects on individuals in the United States and the U.S. economy. The industry is large by any standard. In 1979, the 1,890 legal reserve life insurance companies received $84.9 billion in life premiums and paid out $32.4 billion in benefits. Total life insurance in force at the end of 1979 amounted to $3.2 trillion, covering 114 million policyholders. Two out of three families were insured by legal reserve life insurance companies at the end of 1979.

[17] Facts presented in this section were taken from the *Life Insurance Fact Book, 1980*.



Average coverage per family amounted to $38,500 in 1979.

Investment by life insurance companies are an important source of capital in the U.S. Assets totaled $430 billion at the end of 1979, making the industry one of the largest financial intermediaries. Exhibit 2 compares asset size of major financial institutions.

### Health Insurance [18]

During 1978, insurance companies wrote $32.7 billion in accident and health premiums and paid out $26.4 billion in benefits. Blue Cross/Blue Shield and other hospital-medical plans wrote an additional $28.2 billion in premium and paid out $24.4 billion in benefits. Approximately 181,500,000 persons are protected by private health insurance for hospital expense. Only slightly fewer numbers are protected against surgical expenses, physician's expenses, and major medical expenses.

### Property and Liability [19]

There are 2,867 companies in the U.S. which write property and liability insurance. The assets of these companies amounted to $174.2 million at year-end 1979. Net premiums written in 1979 exceeded $90.1 billion.

### The Insurance Industry in Alabama

The insurance industry in Alabama is a large and mature industry, contributing greatly to the economy of Alabama and providing important insurance products to citizens of Alabama. In 1979, 473 property and liability companies were licensed to do business in Alabama plus 565 life

[18] Data in this section were taken from the *Source Book of Health Insurance Data, 1979-1980*.

[19] Data presented in this discussion are taken from *Insurance Facts, 1980-81 Edition*.

**Exhibit 2**
**SUMMARY OF ASSETS HELD BY SELECTED MAJOR FINANCIAL INSTITUTIONS**
**($ Billions)**

| | 1971 | 1972 | 1973 | 1974 | 1975 | 1976 | 1977 | 1978 | 1979 |
|---|---|---|---|---|---|---|---|---|---|
| Commercial Banks | 531.4 | 605.7 | 684.8 | 744.3 | 775.2 | 835 | 922.6 | 1,055.2 | 1,139.9 |
| Savings & Loan Associations | 204.1 | 241.3 | 270.1 | 293.8 | 336.5 | 390.6 | 457.9 | 529.5 | 579.5 |
| Life Insurance Companies | 228.1 | 243.2 | 260.4 | 277.4 | 297.8 | 326 | 357.2 | 393 | 430.2 |
| Private Non-Insured Pension Funds | 148.8 | 155.6 | 163.8 | 174.5 | 186.3 | 197.5 | 215.2 | 234.8 | 255.9 |
| State & Local Retirement Funds | 73.9 | 83.1 | 92.6 | 103.7 | 115 | 128.1 | 143.8 | 163.7 | 180.5 |
| Mutual Savings Banks | 88.9 | 99.8 | 105.8 | 109.5 | 121 | 134.8 | 147.3 | 158.2 | 169.4 |
| Investment Companies | 48 | 66.6 | 65.1 | 47.8 | 71 | 72.8 | 76.1 | 84.6 | 121.2 |
| Credit Unions | 21 | 24.5 | 27.7 | 31 | 36.8 | 43.2 | 51.5 | 58.5 | 62.3 |

Source: *Salomon Brothers*
1. "Prospects for the Credit Markets in 1977"
2. "Prospects for Financial Markets in 1981"



companies.[8] In addition, there were 17 mutual old-line policy and 20 fraternal benefit companies operating in Alabama. About 36 legal reserve life insurance companies are domiciled in Alabama.[9] In addition, there are 21 property and liability companies with home offices in Alabama.

In 1979, Alabama residents purchased $14.9 billion of ordinary life insurance. Life insurance in force amounted to $111.8 billion, or 1.39% of total life insurance in force in the U.S. (In 1964, 1.57% of total life insurance in force in the U.S. was held by Alabama residents.) The composition of the $111.8 billion of life insurance in force in 1979 is shown below:

| Type | Amount | Percent of Total | Rank of this amount relative to other states |
|---|---|---|---|
| Ordinary | $ [redacted] | [redacted] | 21st |
| Group | 31.1 | 27.8 | 22nd |
| Industrial | 15 | 13 | 16 |
| Credit | 4.6 | 4 | 15 |
| TOTAL | $111.8 | 100 | 22nd |

Industrial insurance has declined in relative importance both nationwide and in Alabama. In 1964 industrial insurance represented 19% of the total life insurance in force in Alabama. By 1979, only 13% of insurance in force was represented by industrial insurance. However, Alabama has more industrial insurance in force than any other state.

In 1979 the average amount of life insurance in force per Alabama family was $17,500, slightly under the U.S. average of $18,500. Family life insurance has increased

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8 1980 Alabama Insurance Report.
9 Life Insurance Fact Book 1980.

in Alabama at a faster rate than for the U.S. as a whole, as shown below.

Average Amount of Life Insurance in Force per Family

| | 1954 | 1964 | Average Annual Growth | 1979 | Average Annual Growth |
|---|---|---|---|---|---|
| Alabama | $4000 | $12,100 | 9.5%/yr | $37,200 | 7.8%/yr |
| U.S. | $6300 | $13,500 | 7.8%/yr | $38,500 | 7.3%/yr |

In 1979, life insurance companies paid $407.7 million in life insurance and annuity benefits to Alabama residents. Benefits payments have increased 285% since 1964.

Life insurance companies have invested in Alabama. These companies held $1.5 billion in mortgages in Alabama and owned $75.8 million in real estate as of the end of 1979.

The number of life insurance companies operating in Alabama has increased over the past twenty-five years, with all of the increase resulting from a greater number of foreign firms doing business in the state. According to the data available to us, there has been a net reduction in the number of legal reserve life insurance companies domiciled in Alabama. However, the increase in foreign companies has more than made up for this decline. In 1964, 22% of the U.S. legal reserve life insurance companies did business in Alabama. By 1979, 30% of all life companies were operating in Alabama. As a result of this development, Alabama should be a more competitive marketplace for insurance products, with resulting benefits to the citizens of Alabama.

Numbers of companies operating in Alabama by type and selected dates are presented below.

| | Number of Companies | | |
|---|---|---|---|
| | 1979 | 1964 | 1956 |
| Domestic | | | |
| Legal Reserve | 36 | 43 | 48 |
| Mutual Aid | 17est. | 19 | 32 |
| Foreign: Legal Reserve | 329 | 292 | 163 |



In 1979, foreign companies wrote 70% of the direct life premiums and annuity considerations written in Alabama. Fifteen years prior, foreign firms had written only 57% of the life premiums (see Exhibit 3). While premium volume of domestic firms had grown at 4.8% per year, foreign firms had realized premium growth of almost twice that, 8.8% per year.

Exhibit 4 presents sources of direct premiums and annuity considerations for domestic and foreign firms in 1979. Both groups are issuing similar policies, and thus competing on the same basis in the same markets. However, the mix of premium volume differs somewhat for the two groups of firms. Domestic firms write 13% of the group life policies and 73% of industrial life.

Over 2 million Alabama residents are protected by private health insurance coverage. Insurance companies provide coverage for 54% of this group. Blue Cross/Blue Shield and other medical payment plans provide protection to another 46%. Alabama residents received $648 million in health insurance benefit payments in 1978.

**EXHIBIT 3**

**SOURCES OF DIRECT LIFE PREMIUMS AND ANNUITY CONSIDERATIONS**

**1964 vs 1979**

| | 1964[1] | | 1979[2] | | Average Annual Compound Growth Rate 1964-1979 |
|---|---|---|---|---|---|
| | ($000) | % Total | ($000) | % Total | |
| Domestic | 102,263 | 43% | 207,251 | 30% | 4.8% |
| Foreign | 137,383 | 57% | 484,686 | 70% | 8.8% |
| Total | 239,646 | 100% | 691,937 | 100% | 7.3% |

[1] Paul Alyea, *Taxation of Life Insurance Companies in Alabama*, 1965, p. 61

[2] 1980 Alabama Insurance Report

EXHIBIT 4
SOURCES OF DIRECT PREMIUMS
AND ANNUITY CONSIDERATIONS IN 1979
(000 Omitted)

| | Alabama Premiums Written by Domestic Companies | % Total | Alabama Premiums Written by Foreign Companies | % Total | Total Premium Written in Alabama |
|---|---|---|---|---|---|
| | $ | | $ | | $ |
| Ordinary Life | 105,838 | 8% | 304,208 | 69% | 410,046 |
| Credit Life | 17,435 | 8% | 44,868 | 9% | 62,303 |
| Group Life | 16,561 | 8% | 110,842 | 25% | 127,403 |
| Industrial Life | 68,417 | 82% | 14,787 | 5% | 83,204 |
| | 207,251 | | 474,686 | | 681,937 |

Source: 1980 Alabama Insurance Report



In 1979, life companies received premiums of $441 million for accident and health business written in Alabama. Of this total, $86 million (or 20%) was written by companies domiciled in Alabama (see Exhibit 5).

EXHIBIT 5
ACCIDENT AND HEALTH PREMIUMS
WRITTEN IN ALABAMA IN 1979[1]

| | Premium Volume | Percent of Total |
|---|---|---|
| Domestic Firms[2] | $ 86,134,000 | 19.5% |
| Foreign Firms | 355,055,000 | 80.5% |
| Total | $441,191,000 | 100% |

[1] 1980 Alabama Insurance Report.
[2] The "Blues" are not included.

Alabama residents and companies paid over one billion dollars in premiums for property and liability protection. Automobile insurance (liability and physical damage) accounted for 42.2% of the total premium receipts. In 1979, about 1.3% of the total premium volume of property and liability companies was derived from premiums written in Alabama.

In 1979, Alabama-domiciled firms wrote 12.3% of the property and liability premiums, while foreign firms wrote $1.1 billion in premiums, or 87.7% of the total (Exhibit 6). Ten years prior, domestic firms had written

EXHIBIT 6
PROPERTY AND LIABILITY BUSINESS
IN THE STATE OF ALABAMA IN 1979
(000 Omitted)

| | Domestic | Foreign | Total |
|---|---|---|---|
| Premiums Written | $158,044 | $1,139,824 | $1,297,868 |
| % of Total | 12.2% | 87.7% | 100% |
| Premiums Earned | 152,871 | 1,097,831 | 1,250,702 |
| % of Total | 12.2% | 87.8% | 100% |
| Incurred Losses | 141,332 | 1,085,311 | 1,226,643 |
| % of Total | 11.5% | 88.5% | 100% |

[1] *1980 Alabama Insurance Report*

about 11% of the total property and liability premiums. The rate of growth in property and liability premiums since 1969 had been extraordinary, both for domestic firms and foreign firms. Domestic firms recorded growth of almost 17% per year compounded (Exhibit 7).

EXHIBIT 7

SOURCES OF PROPERTY AND LIABILITY PREMIUMS WRITTEN IN ALABAMA (1969 vs 1979)

| | 1969 $ mil | % Total | 1979 $ mil | % Total | Average Annual Compound Growth Rate |
|---|---|---|---|---|---|
| Domestic | $ 33.8 | 11% | $ 154.8 | 12% | 16.9% |
| Foreign | 276.8 | 89% | 1,139.5 | 88% | 15.1% |
| | $310.6 | | $1,287.9 | | 15.9% |

A final, but very important, measure of the importance of the insurance industry is its contribution to state tax revenue receipts. The major tax imposed upon insurance companies of all types is the gross premiums tax. In 1979, Alabama received more premium taxes from insurance companies than 39 other states. Also, Alabama receives more premium taxes per Alabama resident than any of the other 10 states with significant amounts of premium tax receipts (Exhibit 8).

## Conclusion

The business of insurance is nationwide. Companies provide similar products and services to policyholders, regardless of the place of domicile of the issuing company. Both domestic and foreign companies compete on the same basis in the same markets. Because of the great mobility of the American people, national advertising, and the ability to market insurance products through local agents, the industry conducts extensive components of its business across state lines. The existence of state



EXHIBIT 8

COMPARATIVE STATISTICS FOR THE ELEVEN STATES WITH THE HIGHEST PREMIUM TAX RECEIPTS IN 1979

| | Total Premium Taxes Received * ($000) | Rank | Total Premium Taxes/State Population |
|---|---|---|---|
| California | 439,826 | 1 | $18.81 |
| New York | 207,964 | 2 | 11.71 |
| Texas | 116,002 | 3 | 12.79 |
| Pennsylvania | 153,053 | 4 | 13.13 |
| Ohio | 119,249 | 5 | 11.09 |
| Michigan | 109,257 | 6 | 11.80 |
| Florida | 103,502 | 7 | 12.28 |
| Massachusetts | 100,433 | 8 | 18.26 |
| Illinois | 87,256 | 9 | 7.76 |
| New Jersey | 85,074 | 10 | 11.24 |
| Alabama | 79,329 | 11 | 20.49 |

* *Insurance Facts*, 1980-1981 Edition, p. 29.

borders per se does not hinder the conduct of a healthy and viable insurance industry nor interfere with the workings of a competitive industry.

Although most of the business of insurance is conducted across state borders, the regulation of insurance has been the domain of the states. Thus the majority of companies find themselves subject to the regulation of several states, many to the regulation of each of the fifty states. The National Association of Insurance Commissioners (NAIC) has recognized the potential burden of regulation by 50 distinct regulatory authorities. A goal of the NAIC has been to provide a great deal of uniformity in regulation in order to minimize the burden on insurance companies operating in several states. The major exception to this striving for uniformity across states, and thus the promotion of the interstate business of insurance companies, has been in the area of state taxation of insurance companies.

The next section will discuss taxation of insurance companies in greater detail.

## II. TAXATION OF INSURANCE COMPANIES

The major tax imposed on insurance companies by the states is known as the gross premiums tax.

Although there are other taxes to which insurance companies are subjected (such as property taxes and franchise fees), the premium tax along with the retaliatory tax represents the major form of state taxation of insurance companies. This section will describe the premium tax and retaliatory tax, discuss the historical evolution of the tax in Alabama, and compare Alabama's tax rates to those imposed by other states.

### The Gross Premiums Tax

State taxation of insurance companies differs fundamentally from state taxation of other corporations. Most corporations are taxed on the basis of net income which is allocated to the individual states in which the corporation does business. Insurance companies, on the other hand, are taxed on the basis of gross receipts, or premium revenue earned from policyholders in the state. The premium tax taxes revenue before allowance for any expenses. Since the gross premiums tax comes off the top, before consideration of any operating expenses, it is possible for insurance companies to incur losses and yet still be subject to the premium tax. The gross premiums tax represents a small percentage applied to a very large base. The resulting tax is significant by any standard. In fiscal year ending September 30, 1990, the premium tax generated $65 million in revenues for the state of Alabama, generating 17% of General Fund Gross Receipts.

### Development of Taxation of Insurance Companies in Alabama

Special taxation of insurance companies by the state of Alabama dates back to as early as 1849, when a premium tax of 1% was imposed on premiums written by



foreign companies within the state of Alabama. A similar tax was not imposed upon domestic companies until 1868 when the rate for foreign companies was raised to 2% of premiums and a premium tax rate of 1% established for domestic firms. The discriminatory taxation existed until 1876 when the new statute taxed both foreign and domestic firms at a rate of 1% of premiums. A discriminatory tax was reinstituted in 1907 and discriminatory rates of taxation existed until 1945. For 10 years thereafter, domestic and foreigns were taxed at equal rates. Then, in 1955, the legislature made considerable changes in taxes on insurance premiums, forming the basis for the law as it now exists.

Today, domestic insurance companies are subject to a 1% tax on taxable premiums. Foreign life insurance companies are subject to a 3% tax on taxable premiums written in the state of Alabama and a 1% tax on annuities. Nonlife insurers (except wet marine and transportation insurance) pay a premium tax amounting to 4% of premiums.

Theoretically, foreign firms are allowed to lower their premium tax rate to a minimum of 2% for life companies and 3% for nonlife companies if they meet the investment requirements of the state. Specifically, the law states that a foreign company may reduce its tax rate one-tenth of one percent for each 1% of its total admitted assets which are invested in Alabama until a minimum tax rate of 2% is reached. In other words, if a foreign life insurance company invests 10% of its assets in Alabama, it can reduce its tax rate to 2%. This incentive tax rate is still a full one hundred basis points higher for life and two hundred basis points higher for nonlife companies than the rate a domestic firm is subject to, even if that domestic company has no investments in Alabama. (It is practically unrealistic to expect foreign firms to be able to lower their tax rate through this investment incentive. Foreign life companies, for

example, would have to invest $43 billion in Alabama to lower their tax liability only $8.4 million.)

In addition, both foreign and domestic firms are allowed tax credits to be applied against the firm's premium tax liability. These are summarized on the following page:

| FOREIGN | DOMESTIC |
|---|---|
| (1) all ad valorem taxes paid by foreign insurer on real estate and improvements in the state owned and at least 50% occupied by insurer for full year | (1) all ad valorem taxes paid on any building and real estate and occupied in whole or in part by the insurer as its principal place of business |
| (2) all license fees and taxes paid to any county | (2) all ad valorem tax paid on real estate and improvements owned and at least 50% occupied by the insurer for full tax year |
| (3) expenses of examination by Alabama Insurance Commissioner | (3) all license fees and taxes paid to any county |
| (4) all Alabama franchise taxes paid | (4) expenses of examination by Alabama Commissioner of Insurance |
| | (5) all license of privilege taxes on lists of securities paid by the insurer |
| | (6) all franchise taxes paid |

### Comparison Across States [22]

The majority of states have imposed a gross premiums tax as the principal form of taxation of insurance companies. Although the form of taxation is similar across states (a premium tax rate applied to taxable premiums, as defined), the specific features of the tax vary considerably. The tax rate varies from a low of 0 for domestic companies in about 10 states to a high of 4% for foreign

[22] An appendix to this testimony summarizes the taxation of life insurance companies in the fifty states.



firms in Oklahoma. The tax base also differs substantially. Although insurance premiums are the starting point in the calculation of the tax base in all states, states differ in the treatment of such features as annuities, dividends applied to reduce future premiums, and dividends applied to paid-up additions. All states allow a deduction from the taxable base for return premiums and most states permit the deduction of policyholder dividends.

There is also considerable difference in the treatment of annuity considerations. Twenty-nine states fully exclude annuity considerations from taxation. Seven other states tax annuities at preferential rates. Premiums on pension plans qualified under sections of the Internal Revenue Code are usually exempt from tax, or taxed at a lower rate. In addition, some states tax accident and health premiums at different rates from life premiums.

Alabama's 3% tax on foreign life insurers is high relative to other states. Forty-two states tax foreign companies at a rate below 3%. Only 3 states have imposed premium tax rates that exceed 3% on premiums written by foreign insurers: 4% in Oklahoma, 3.197% in Hawaii, and 3.3% in Texas.[23] Half of the states impose a premium tax rate of 2%. Forty-seven states impose a retaliatory tax on foreign insurers.

### The Retaliatory Tax

Half of the states tax domestic firms at more favorable rates than the rates imposed on foreign firms. Any benefit to the domestic industry from such favorable tax treatment proves imaginary because of the existence of retaliatory laws in 47 states and because of the economic rewards which motivate insurers to conduct business in

[23] The tax base in Texas excludes first year premiums and thus is a smaller base than in many states.

several states. As was mentioned in Section I, insurance companies for the most part, conduct business nationwide.

Under a retaliatory tax, a state taxes a foreign insurer at the greater of two rates: (1) the rate the state imposes on foreign companies operating in the state, or (2) the rate that the state of domicile of the foreign company imposes on the original state's domestic companies. A somewhat simplified example is useful at this point. Several foreign companies operating in Alabama are domiciled in Tennessee. In addition, several Alabama-domiciled companies do business in Tennessee. Alabama taxes foreign companies at a 3% rate. Tennessee taxes foreign companies at a 2% rate, but also applies a retaliatory tax. Because of Tennessee's retaliatory tax, Alabama companies pay to Tennessee a gross premium tax of 3% on business written in Tennessee. The application of the tax is summarized below:

| | State Taxing Authority | |
|---|---|---|
| | Alabama | Tennessee |
| Rate Applied to Foreign Companies | 3% | 2% |
| Effect of Retaliatory Tax | | 3% on Premiums Written in Tennessee by Alabama Companies |

The reasoning behind retaliatory taxation is succinctly summarized in the following sentence: "The moment our companies are not treated in your state with the same favor which we treat your companies, we will retaliate by treating your companies the same as you treat ours." [24]

In 1931, the Alabama statutory provision for retaliatory taxation was ruled invalid by the Alabama Supreme

[24] Paul Alyea, *Taxation of Life Insurance Companies in Alabama*, p. 44.



Court. However, in 1971, the legislature rewrote the tax code, reinstating the retaliatory tax. In reality, a retaliatory tax by Alabama has little practical impact since only 3 states have higher tax rates for foreign companies than does Alabama (Hawaii, Texas and Oklahoma).

On the other hand, the high tax rate Alabama imposes on foreign companies coupled with the retaliatory tax has negative consequences for the state of Alabama and Alabama's domestic industry. First, it tends to cripple the development of the interstate business of Alabama insurers. As in the example presented earlier, Alabama insurers who do business in Tennessee must pay a 3% gross premiums tax to Tennessee. Other foreign companies, domiciled in states with a less onerous tax on foreign companies, will be subject to a lower tax, some as low as 2%. Thus, Alabama companies doing business in Tennessee will be at a competitive disadvantage because they will be competing against firms with a lower state tax burden. A second effect is that Alabama companies are unnecessarily exporting tax dollars to other states. Simplified examples demonstrating this result are presented in Exhibit 9 and Exhibit 10. Exhibit 9 shows

EXHIBIT 9
A SIMPLIFIED EXAMPLE TO SHOW EFFECT OF RETALIATORY TAX ON PREMIUM TAX LIABILITY OF LIBERTY NATIONAL

| | Alabama | Other States | Total |
|---|---|---|---|
| Premiums | $141,656,000 | $131,049,000 | $272,747,000 |
| Percent of Business | 52% | 48% | |
| Premium Tax Rate Assumed | 1% | 3% | |
| Gross Tax Liability | $ 1,416,560 | $ 3,931,470 | $ 5,348,450 |
| Average Premium Tax Rate Across States | | | 2% |

This simplified analysis ignores effects of lower tax on annuities in many states. However, the impact on these results should be minor.

**EXHIBIT 10**

**A SIMPLIFIED EXAMPLE TO SHOW EFFECT OF RETALIATORY TAX ON SOUTHERN LIFE AND HEALTH INSURANCE COMPANY**

| | Alabama | Other States | Total |
|---|---|---|---|
| Premiums | $6,514,317 | $21,135,943 | $27,650,260 |
| Percent of Business | 23% | 77% | |
| Premium Tax Rate Assessed | 1% | 3% | |
| Gross Premium | $ 65,144 | $ 634,078 | $ 697,222 |
| Average Premium Tax Rate Across States | | | 2.5% |

This simplified analysis ignores effects of lower tax on annuities in many states. However, the impact on this results should be minor.

the effect of the retaliatory tax on the total premium tax liability of Liberty National Life, Alabama's largest insurer. Liberty National writes 23% of its business in Alabama. These premiums are subject to a 1% gross premium tax. It is a reasonable assumption that the other 48% of Liberty National's premiums will be subject to a 3% gross premium tax because of prevailing retaliatory tax provisions. As shown in the Exhibit, Liberty National is paying to other states almost three times the tax dollars it pays to Alabama while writing less premiums in the other states.

Because of its large tax burden on out-of-state business, Liberty National incurs an average premium tax burden of 2%, which happens to be the rate most frequently imposed by the various states on foreign insurers. However, it is states other than Alabama that are benefiting from the Alabama taxing scheme. A similar example was prepared about Southern Life and Health. The results are even more dramatic in this example because Southern Life and Health writes a larger percentage of its premiums outside Alabama than does Liberty National. As Exhibit 10 shows, the average tax liability is approximately 2.5%. Tax payments by Southern Life and Health exceeds payments to Alabama by more than ten times.



The implication is that Alabama could increase its tax receipts by 2½ times the current amount (a tax rate of 2.5%) with no additional cost to Southern Life and Health.

The average tax rate for the 10 largest Alabama companies is presented in Exhibit 11. Four of the companies experience an overall tax rate of 2% or above. The other six companies are able to keep their effective premium tax rate below 2% by limiting the amount of out-of-state business they write.

The summary results for the 10 companies are presented in Exhibit 12. The group as a whole writes 51.8% of its premiums in Alabama, yet pays out only 26.3% of its total premium tax liability to Alabama. The irony is that this inequity results directly from the actions of the Alabama legislature in designing the current tax scheme in an environment in which retaliatory taxation is a fact of life.

Discussions with management of major insurance companies indicate that in pricing policies companies take into consideration the average tax rate paid across all states. Thus, for example, if Liberty National also follows this practice in pricing products, then the average 2% tax rate Liberty National pays is in effect passed on (at least to some degree) to consumers of Alabama even though Liberty National is only charged 1% on those premiums. In effect, then, *Alabama policyholders*

EXHIBIT 11
TOTAL PREMIUM TAX BURDENS
OF LARGEST ALABAMA LIFE INSURERS
(1979 Data)

| Company | Amount of Premiums in Alabama | Gross Premium Tax in Alabama | Out-of-State Premiums | Gross Premium Tax on Out-of-State Premiums | Total Premium Tax | Average Tax Rate Experienced * |
|---|---|---|---|---|---|---|
| Liberty National | $141,696,000 | $1,416,960 | $61,561,670 | $ 615,617 | $ 2,032,577 | 2% |
| Protective Life | 42,500,000 | 425,000 | 1,797,370 | 17,974 | 442,974 | 2.2% |
| Insurance Company | | | 80,313,000 | 1,606,260 | 1,606,260 | 2% |
| Southern Life and | 4,314,000 | 43,140 | 21,136,000 | 634,080 | 677,220 | 2.5% |
| Health Insurance Company | | | 8,884,000 | 177,680 | 177,680 | 2.5% |
| Volun Life | 22,113,000 | 221,130 | 22,347 | 447 | 221,577 | 1.5% |
| Booker T. Washington | 11,765,000 | 117,650 | — | — | 117,650 | 1.5% |
| Southern United Life | 8,008,000 | 80,080 | 170,000 | 2,550 | 82,630 | 1.5% |
| Insurance Company | 8,342,000 | 83,420 | 8,784,000 | 175,680 | 259,100 | 1.5% |
| National Security | 4,933,000 | 49,330 | 44,754 | 895 | 50,225 | 1% |
| Insurance Company | 14,548,000 | 145,480 | 1,482,000 | 29,640 | 175,120 | 1.2% |
| Federated Guaranty Life | | | 1,083,000 | 21,660 | 21,660 | 2% |
| Insurance Company | 24,550,000 | 245,500 | 7,857,000 | 157,140 | 402,640 | 1.6% |
| Life Insurance Company | 276,000 | 2,760 | 10,108,000 | 202,160 | 204,920 | 2% |
| Mutual Savings Life | | | | | | |
| Insurance Company | | | | | | |
| Total | $284,115,000 | $2,842,110 | $7,410,000 | $18,082,521 | | |

* Total Premium Taxes/Total Premiums



EXHIBIT 12
SUMMARY RESULTS:
TOTAL PREMIUM TAX BURDENS
OF LARGEST ALABAMA COMPANIES

| | Alabama | Other States |
|---|---|---|
| Premiums Written by Location (Percent of Total) Direct Premiums | 61.8% | 48.2% |
| Gross Premium Taxes Owed (Percent of Total Gross Premium Taxes) | 86.5% | 13.77% |
| Weighted Average Tax Rate Across All States: | | 2.5% |

*are subsidizing the out-of-state business of Alabama domestic companies.*

Certainly, there can be no doubt that neither Alabama policyholders, nor Alabama companies really benefit from the current taxing scheme. The same conclusion is the current taxing scheme. The same conclusion is ago. Dr. Alyea, Professor Emeritus at the University of Alabama, conducted a study of taxation of life insurance companies in Alabama. This study was commissioned by the Association of Alabama Life Insurance Companies and conducted under its direction. In the preparation of my testimony, I have consulted his work, *Taxation of Life Insurance Companies in Alabama*. I will refer to his work throughout this document, as I find his discussion thorough and most relevant to the issues of this case, even though his report was prepared over 15 years ago for the association of domestic life companies.

Dr. Alyea concludes that the Alabama taxing scheme is harmful. The following comments in this regard are particularly relevant to this discussion of the effect of

Alabama's tax laws in an environment of retaliatory taxation:[40]

> "Many Alabama companies are becoming aware of the considerable handicap they encounter in their foreign operations. The most recent serious proposal to increase taxes on life insurance premiums was contained in House Bill No. 94 of the 1963 session of the General Assembly. This bill, if enacted, would have increased the premium tax on domestic life insurers from ½ to 2.5 percent, and the tax on foreign insurers from 3 to 4 percent. In his testimony before the House Ways and Means Committee, March 28, 1963, Clarence W. Daugette, Jr., President of the Association of Alabama Life Insurance Companies, based his opposition partly on the damage this would do to Alabama companies in their foreign business: A number of Alabama companies have now grown to the point where we can completely qualify to do a life insurance business in other states . . . if the proposed bill is adopted, the tax paid by Alabama companies to these other states would automatically increase to 4 percent without any action on the part of the legislature of those states.
>
> "The Alabama life insurance companies are already at a competitive disadvantage in trying to bring premium dollars from those states into Alabama because the present Alabama tax rate of 3 percent is so far above the national average. The adoption of the proposed bill would definitely place this growing Alabama life insurance industry under a terrific handicap.
>
> "As more Alabama companies qualify in other states, it seems reasonable to expect that a more critical look will be taken at the high tax rate being levied against foreign companies since this high rate penalizes the Alabama companies doing business in other states."

[40] Ibid., p. 43



## Importance of the Premium Tax as a Revenue Producer

The gross premium tax is a major source of revenue for the state of Alabama. According to the Annual Report of the State of Alabama, Alabama received over $65 million in revenues from the gross premium tax for the fiscal year ending September 30, 1980. Insurance premium tax receipts represented 16.7% of General Fund Gross Receipts. Another $13 million was earmarked for the Special Education Trust Fund. Exhibit 13 presents premium tax receipts for the last 3 years.

EXHIBIT 13

IMPORTANCE OF THE ALABAMA PREMIUM TAX AS REVENUE PRODUCER

| | Fiscal Year[1] | | |
|---|---|---|---|
| | 1977-1978 | 1978-1979 | 1979-1980 |
| Insurance Premiums (General Fund) | $41,139,111 | $47,500,915 | $52,181,815 |
| Insurance Premiums General Fund as of Percent of General Fund Gross Receipts | 17.7% | 17.9% | 16.7% |
| Insurance Premiums (Earmarked for Special Education Trust Fund) | $10,750,554 | $11,818,997 | $13,016,998 |
| Insurance Premiums Receipts from Premium Tax | $51,889,665 | $59,319,912 | $65,197,813 |
| Percent Increase from Previous Year | | 14.3% | 9.9% |

Source: Annual Report of the State of Alabama

[1] Year ending September 30.

In addition to being large, premiums taxes have represented a growing and stable source of revenues for Alabama. According to the 1967 Alabama Insurance Report, $5.2 million in premium taxes were generated during the calendar year 1956. By 1968, premium taxes had increased to $14.9 million, resulting in an average compound growth rate of 7.3% per year. The 1980 Alabama Insurance Report shows premium taxes of $60 million received during calendar year 1979. This significant increase in premium taxes since 1969 represented a compound growth rate of 14.9% per year.

Although the data is not readily available, it's certainly safe to presume that foreign insurers have been the major source of premium tax revenues for the state.

ALABAMA INSURANCE PREMIUM BY SOURCE
(1979)

| | Domestic ($ millions) | Foreign ($ millions) | Total ($ millions) |
|---|---|---|---|
| Life Premiums | [illegible] | 494.7 | |
| Accident and Health Premiums | 86.1 | 355.1 | |
| Property and Liability Premiums | 158.9 | 1,120.5 | |
| Total | $431.7 | $1,969.3 | $2,401 |
| % of Total | 18.7% | 81.3% | |

The table above presents Alabama insurance premiums by source for 1979. Domestic companies wrote $431.7 million in premiums in Alabama in 1979. If we apply a 1% premium tax to this premium volume, we can derive an estimate of the premium tax liability of domestic insurers. (This estimate is likely to overstate the total Alabama premium tax liability of domestic insurers because of the tax credits allowed.) This simplified calculation implies that domestic companies contributed $4.3 million in premium tax revenues to Alabama while foreign companies would have contributed the other $55.5 million. In other words, foreign companies write four times more premiums in Alabama than do domestic companies, while paying more than twelve times the premium taxes that domestic companies pay.



## Effective Tax Burden Imposed by the Gross Premium Tax

The deceptively low premium tax rate when applied to premium volume results in a significant effective tax burden on insurance companies. For example, California imposes a premium tax rate of 2.35% on all premiums written in California. I recently completed a study which showed that this 2.35% tax on premiums (really, gross receipts) was equal in tax burden in 1978 to an 18% tax on California pretax income (where income is measured by income as reported to the Internal Revenue Service, allocated to California on the basis of relative premium volume) and to a 17% tax on pretax statutory income (allocated on a basis of relative premium volume).

A somewhat related analysis was conducted for Alabama in 1965 by Dr. Alyea. The study indicated that the low premium tax rate imposed on domestic firms (.5% of Alabama premiums at that time) translated into an effective tax burden on Alabama income of 9.8% for the median firm when considering gross premium taxes and 8.4% for the median firm when considering net premium taxes. For the domestic firms, the effective tax burden of total premiums taxes (all states) relative to total income was about 15%, almost double the Alabama tax burden. This shows the significant real cost to domestic firms which results from the high tax Alabama imposes on foreign firms and the retaliatory tax provisions imposed by other states.

"Alabama life insurers are clearly paying out a larger fraction of their total incomes in total pre-

ecism taxes than the burden of premium taxes paid on domestic business" [26] (Exhibits 14 and 15 replicate Mr. Alyea's tables relevant to this discussion.)

I attempted to replicate Mr. Alyea's analysis using publicly available data for the top 10 domestic firms and the top 10 foreign firms. The effective tax burden on Ala-

EXHIBIT 14

EFFECTIVE TAX BURDEN OF ALABAMA DOMESTIC COMPANIES IN 1961 [1]

TABLE 8

FREQUENCY DISTRIBUTION: ALABAMA GROSS PREMIUM TAXES AS A PERCENT OF ALABAMA NET INCOME DOMESTIC COMPANIES

| Class Intervals | | | | Number of Companies in Class |
|---|---|---|---|---|
| From | 0.01 | to | 4.9 percent | 14 |
| From | 5.00 | to | 9.9 percent | 6 |
| From | 10.00 | to | 14.9 percent | 5 |
| From | 15.00 | to | 19.9 percent | 5 |
| Over | | | 100.0 percent | 10 |
| Median | | | 9.8 percent | 40 |

TABLE 9

FREQUENCY DISTRIBUTION: ALABAMA NET PREMIUM TAXES AS A PERCENT OF ALABAMA NET INCOME DOMESTIC COMPANIES

| Class Intervals | | | | Number of Companies in Class |
|---|---|---|---|---|
| | | | 0 percent | 9 |
| From | 0.5 | to | 4.9 percent | 19 |
| From | 5.0 | to | 9.9 percent | 6 |
| From | 10.0 | to | 14.9 percent | 4 |
| From | 15.0 | to | 19.9 percent | 1 |
| Over | | | 100.0 percent | 11 |
| Median | | | 8.40 percent | 40 |

[1] These tables are taken from *Taxation of Life Insurance Companies in Alabama* by Paul Alyea, 1963, pp. 90-92.

[26] Ibid., p. 88



TABLE 10

FREQUENCY DISTRIBUTION: TOTAL PREMIUM TAXES AS A PERCENT OF TOTAL NET INCOME DOMESTIC COMPANIES

| Class Intervals | | | | Number of Companies in Class |
|---|---|---|---|---|
| From | 0.01 | to | 4.9 percent | 1 |
| From | 5.0 | to | 9.9 percent | 3 |
| From | 10.0 | to | 14.9 percent | 5 |
| From | 15.0 | to | 19.9 percent | 3 |
| From | 20.0 | to | 29.9 percent | 2 |
| From | 30.0 | to | 39.9 percent | 2 |
| From | 50.0 | to | 59.9 percent | 1 |
| Over | | | 100.0 percent | 5 |
| Median | | | 15.2 percent | 22 |

bama income (where total income is allocated to Alabama on the basis of premiums) is presented for domestic firms in Exhibit 16 and for foreign firms in Exhibit 17. The domestic firms as a group had an effective tax burden of 4% based on gross premium taxes and 3% using net premium taxes. The foreign firms, as a group, experienced an effective tax burden of 21%, more than five times the domestic tax burden.

The results of Dr. Alyea's analysis were similar. "For all but a small fraction of foreign life insurance companies, the State of Alabama is preempting for its general fund an exceptionally large slice of the net incomes of foreign life insurance companies." [27]

Unfortunately, we do not have access to data regarding the amount of premium taxes Alabama companies pay to other states. Thus, we are unable to compute the total tax burden of these companies. The major conclusion of this analysis is that the seemingly small difference in premium tax rates on domestic versus foreign firms translates into a truly significant difference in effective tax burden, based on income.

[27] Ibid., p. 95

## EXHIBIT 15

### EFFECTIVE INCOME TAX BURDEN OF TEN DOMESTIC LIFE BUSINESS DOING CONSIDERABLE OUT-OF-STATE BUSINESS[1]

(1964 Data)

| Company No. | Percent Premiums of Total Premiums | Percent Out-of-State Premiums of Total | Percent Total Premium Taxes of Total Incomes | Percent Gross Ala. Premiums Taxes of Alabama Incomes | Percent Net Ala. Premium Taxes of Alabama Incomes |
|---|---|---|---|---|---|
| 1 | 0.0 | 100.0 | 32.88 | 0.00 | 0.00 |
| 2 | 26.7 | 73.3 | 32.85 | 11.78 | 8.57 |
| 3 | 28.4 | 71.6 | 16.88 | 7.23 | 8.57 |
| 4 | 41.7 | 58.3 | 12.16 | 4.24 | 0.00 |
| 5 | 41.2 | 58.8 | 52.28 | 14.12 | 14.12 |
| 6 | 50.2 | 49.8 | 25.62 | 10.91 | 10.51 |
| 7 | 55.3 | 44.7 | 10.58 | 3.57 | 3.01 |
| 8 | 56.7 | 43.3 | 15.70 | 8.50 | 8.50 |
| 9 | 58.4 | 41.6 | 6.25 | 2.91 | 2.53 |
| 10 | 63.5 | 36.5 | 24.70 | 12.65 | 10.91 |

[1] This table was presented in *Taxation of Life Insurance Companies in Alabama* by Paul Alyea, 1965, p. 92.





## EXHIBIT 16

### EFFECTIVE ALABAMA TAX BURDEN OF DOMESTIC COMPANIES WITH GREATEST MARKET SHARE IN ALABAMA

| Company | Alabama Premiums/ Total Premiums | Alabama Gross Premium Tax/ Alabama Income | Alabama Net Premium Tax/ Alabama Income |
|---|---|---|---|
| Baker T. Washington | 1 | N.A. | N.A. |
| Federal Guaranty | 100 | N.A. | N.A. |
| Liberty National | 331 | N.A. | N.A. |
| Life of Alabama | 349 | N.A. | N.A. |
| Mutual Savings | 364 | N.A. | N.A. |
| Protective Life | 849 | N.A. | N.A. |
| Southern United | 733 | N.A. | N.A. |
| National Security | 337 | N.A. | N.A. |
| Southern Life and Health Values | 364 | N.A. | N.A. |
| Weighted Average for Sample | | N.A. | N.A. |
| N.A. - Not Available | | | |

## EXHIBIT 17

### EFFECTIVE ALABAMA TAX BURDEN OF FOREIGN COMPANIES WITH GREATEST MARKET SHARE IN ALABAMA

| Company | Alabama Premiums/ Total Premiums | Alabama Gross Premium Tax/ Alabama Income | Alabama Net Premium Tax/ Alabama Income |
|---|---|---|---|
| Equitable Ayres | .0119 | N.A. | N.A. |
| John Hancock | .0143 | N.A. | N.A. |
| Metropolitan | .0000 | N.A. | N.A. |
| New York Life | .0106 | N.A. | N.A. |
| National Life & Health | .0036 | N.A. | N.A. |
| Prudential | .0051 | N.A. | N.A. |
| State Farm | .0000 | N.A. | N.A. |
| Mutual of New York | .0163 | N.A. | N.A. |
| Weighted Average Tax Burden for Sample | | N.A. | N.A. |

## Conclusion

The gross premium tax is a significant source of revenues to the state of Alabama. However, it is estimated that only 8% of the premium tax receipts are contributed by domestic firms. A major objective implicit in the premium tax seems to be to raise revenue for the state at the great expense of foreign firms operating in the states.

Alabama taxes foreign firms at rates greater than the majority of other states. Only 3 states have premium tax rates on foreign firms which exceed the rate which Alabama imposes on foreign firms.

The top 10 domestic companies in Alabama write a significant percentage of their premiums in other states. The high rate which Alabama imposes on foreign firms, plus the existence of retaliatory tax laws in 47 states, increases the out-of-state tax liability of domestic insurers, providing a potential barrier to the development of their interstate business. The state of Alabama is harmed. Tax dollars are unnecessarily being exported to other states. Some of the increased costs of doing business in other states are probably passed on to Alabama policyholders in the form of higher prices. The full economic development of Alabama companies is hindered.

Mr. Alyea similarly concludes that the tax structure is harmful to the state of Alabama:

> "It must be concluded that, on balance, the Alabama premium tax rate structure on life insurers is unwise. Although of benefit to the majority of domestic companies in their struggle for maturity, it does mitigate against Alabama companies growing strong in interstate business. Some of the smaller domestic companies would find it difficult to compete and persist without the subsidy. On the other hand, the relatively high retaliatory taxes imposed on the interstate business of Alabama companies does operate as an additional handicap in expanding their out-of-state volume. One effect has been to keep the total of personal incomes in Alabama at a lower level than would be reached by an insurance industry enjoying more out-of-state business. Such an industry would be more profitable, thus permitting more employment at higher salary levels, with larger dividends." [28]



## III. ECONOMIC EFFECTS OF DISCRIMINATORY TAXATION

The purpose of this section is to present an economic analysis of the expected effects of imposing a discriminatory tax on foreign insurers. In order to understand the economic impact of discriminatory taxation, an appreciation of the nature of competition in the insurance industry is necessary. This section begins with a simple discussion of the level of competition in the industry. The economic consequences of discriminatory taxation are then described. The technical economic analysis is presented in the Appendix, along with relevant demand and cost curves. The major conclusion of this analysis is that the discriminatory tax has adverse competitive and economic effects.

### Level of Competition in the Insurance Industry

It is reasonable to assume that insurance is not sold under perfectly competitive conditions, if for no other reason than that nothing in this world is perfect.

Under perfect competition identical products offered by different companies (or even the same company) must sell at identical prices. If this were not the case, the higher priced company would be driven out of business as buyers would always buy at the lower price.

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[28] Ibid., p. 59

This scenario is highly intuitive and, at first glance, one is tempted to believe that the world is surely a very competitive place. However, price is only one, albeit a very important, consideration in any purchase decision. Consider two retail stores, one in the center of a large city and the other two miles outside the city. The city store can charge higher prices, even for identical products, as some customers prefer buying there at higher prices to driving to the store outside the city, i.e., the time and gasoline saved more than compensate for the higher prices. Of course, there is a limit to the price differential that can be charged by the city store because at higher and higher differentials more and more customers would find it in their best interests to make the trip outside the city. Location is a very simple form of non-price competition but a surprisingly powerful one as can be readily observed every day. There are many other forms of such competition but the most important one for the insurance industry is customer ignorance. A whole life insurance policy, for example, is actually a pre-packaged bundle of distinct products comprising some combination of coverage, savings, guaranteed insurability, double indemnity, etc., yielding cash flows comprising premiums, dividends and benefits. A typical customer would need to know the prices of each component to compare policy prices and, since these are not available, significant price and product variability is possible and actually exists over policies offered by various companies as shown by Belth & Maxwell[28] and Consumer Reports.[29]

Non-price competition then is one basis for the departure from perfect competition by the insurance industry. Another equally important basis lies in the cost structure of

[28] Belth, J.M. and Maxwell, W.J., "The State of Competition in the Life Insurance Industry." The Antitrust Bulletin, Vol. XV (Summer 1970), pp. 313-343.

[29] Consumer Reports, "Life Insurance," January, 1974 and February, 1980.



the industry. The terms increasing, constant, or decreasing returns to scale refer to decreasing, constant, or increasing average costs as volume increases, respectively. For example, if the total cost of writing ten policies were $20, then the average cost of writing a policy at a volume of ten policies would be $2. Further, suppose that writing twenty policies cost $35, implying an average cost at this volume of $1.75. A company facing this cost structure and writing ten policies per period would be said to be operating under decreasing average costs or increasing returns to scale. Finally, suppose that writing forty policies cost $90, i.e., average cost equals $2 at a volume of forty. The company would be said to face increasing returns to scale at a volume of ten policies and decreasing returns to scale at a volume of forty policies. Typically, a firm exhibits increasing returns to scale at lower volumes, constant returns to scale over some higher volume range, and then decreasing returns to scale at high volume. As a simple example, consider a single assembly line. At low volumes the average cost per unit output is quite high due to the high fixed costs associated with such a line. As volume increases average cost decreases as the fixed costs are averaged over a larger output. However, at very high volumes the line must be run at top speed over longer time periods resulting in line breakdowns, overtime for workers, etc., resulting in increasing average costs.

An industry comprising firms operating under increasing returns to scale would find its firms merging with one another until either there were only one giant firm left or until the surviving firms were operating at large enough volumes to exhibit constant or decreasing returns to scale. In the example above, two firms writing ten policies each would have a total cost for writing twenty policies of $40. If they merged, the total cost for one firm to write twenty policies would be $35, or $5 less. On the other hand, if two of these "merged" firms were to

merge again, the total cost of one firm writing forty policies would be $80, or $10 greater than the cost of two firms writing twenty policies each. For this industry, then, all the firms would "double up," but not "quadruple up," with these resulting firms facing, at best, insignificantly increasing returns to scale. In general, if the cost structure of the industry is such that the number of firms, after all appropriate cost-cutting mergers, is very large then the industry is at a minimum highly competitive; if the number is small to medium, the industry is oligopolistic, and, if there is only one firm, it is a monopoly. The distinguishing trademark of oligopoly is that there are few enough firms so that the actions of one firm influence the actions of the others. For both oligopoly and monopoly industry configurations prices are higher and volume lower than if the industry were competitive.

There is support for the notion that the insurance industry is an oiogopoly given by Scherer [30] and Shepard.[31] However, Brainard & Dirlam,[32] in a study based on concentration ratios, concluded "that the service of insurance is usually supplied in conditions approximating those of constant cost, and that economies of scale are not so pronounced as to lead to monopoly or oligopoly." Econometric studies by Houston & Simon [33] and Geehan [34]

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[30] c.f. Scherer, F.M., "Industrial Pricing," (Chicago: Rand McNally and Company, 1970).

[31] Shepard, W.G., Market Power and Economic Welfare, Random House, New York, 1970.

[32] Brainard, C. and Dirlan, J. "Antitrust, Regulation and the Insurance Industry: A Study in Polarity," The Antitrust Bulletin, vol. 11 (1966).

[33] Houston, D.B. and Simon, R.M., "Economics of Scale in Financial Institutions: A Study in Life Insurance." Econometrica, Vol. 38, No. 6 (November 1970).

[34] Geehan R., "Return to Scale in the Life Insurance Industry," The Bell Journal of Economics, Vol. 8, No. 2 (Autumn 1977), pgs. 497-516.



further support the notion that economies of scale in the insurance industry may exist but are not pronounced. A synthesis of these viewpoints leads to the conclusion that the insurance industry exhibits a hybrid form of competition lying somewhere between perfect competition and oligopoly, i.e., monopolistic competition.

## Discriminatory Taxation

Premium taxes are one component of total, and thus average, cost. If premium taxes are levied on all firms equally, then such taxes do not interfere with the efficient allocation of economic resources across firms in the industry. The premium tax, in this situation, is then neutral in its economic effects on firms in the industry and the efficiency and effectiveness of the economic process is preserved. Of interest in this analysis are the economic consequences that can be expected if certain firms in the industry are subjected to a premium tax rate which exceeds the tax rate imposed on other firms, i.e., a discriminatory tax rate.

The premium tax structure in Alabama groups insurance firms into three principal categories, i.e., foreign firms, domestic firms, and potential domestic firms, and for the sake of analysis each group may be considered a single firm in a three firm oligopoly. In the model to be analyzed there are initially only foreign and domestic firms actually in operation with both subject to the same premium tax rate. Potential domestic firms are those firms that in this initial configuration are not in operation as it would not be profitable to be so. Foreign firms are then considered to be subjected to a discriminatory excess premium tax rate and the resultant industry equilibrium is analyzed.

The direct effect of such discrimination is to increase the total and average costs of foreign firms. The first level induced effects are an increase in price and a reduction

in volume written by foreign firms. Obviously, such firms will try to pass along some or all of the discriminatory tax to insurance purchasers in the form of higher prices and, equally obviously, when price is higher customers buy less. The second level induced effects will then be a significant increase in demand for insurance policies written by domestic firms, the source of which being customers who have fled the higher prices of foreign firms, followed by an increase in their prices. At first domestics would have a difficult time handling their suddenly increased volume, and this opportunity to raise prices would be irresistible. After two levels of induced effects, then, both foreign and domestic insurers would be writing policies at increased prices with foreign volume lower and domestic volume higher, but with total volume lower due to the overall increased price level. The third level induced effect will be the entry into the market of those potential domestic firms, whose operations will be made profitable at the higher prices, as new domestic firms. (A more technical version of this analysis is given in the appendix.)

The economic impact of discriminatory premium taxation on the Alabama insurance industry can now be easily understood. The overall price level of insurance policies would rise with the overall volume of policies written naturally declining. Of the reduced overall volume, domestic firms would have a larger share in terms of 1) increased sales by existing domestics, 2) sales of new domestic entrants into the market, 3) decreased sales by foreign firms continuing in the Alabama market, and 4) sales lost by exiting foreign firms. Of course, whether or not any domestics actually enter the market and/or foreigns exit would depend on the extent of the discrimination, etc., but the forces would definitely be in these directions, albeit of unknown strength without specific characterization of the situation.



Since aggregate coverage would be reduced under a discriminatory tax structure, as discussed, it can be readily surmised that the factors of aggregate coverage, i.e., average coverage per insured and numbers of insured, would be reduced as well. A typical insurance purchaser facing increased prices would obviously buy less insurance or, in some cases, none at all. Domestic firms would be aided by such discrimination, as discussed, but foreign firms would find increased barriers to entry due to the relatively lower profitability of writing insurance in the state. Finally, since foreign firms continuing to operate in the state could not pass along the whole excess tax in the form of price increases (as the elasticity of their demand functions is certainly not zero), they would suffer a decline in their profitability leading inevitably to lower levels of customer service. Since foreign firms write over half of all insurance written in Alabama, in the face of such discrimination, Alabama insureds, on average, suffer a lower level of customer service than could be obtained in the absence of such discrimination.

To summarize, the major economic effects that can be reasonably expected from imposing a discriminatory tax on foreign issues include the following:

(1) higher prices

(2) reduced aggregate quantity

(3) reduced number of insured and reduced average quantity

(4) increased barriers to entry by foreign firms

(5) lower levels of service

(6) possible entry by domestic firms if the increased level of prices is sufficient to cover the high costs of these more inefficient firms

(7) possible exit by foreign firms if the cost increase from the discriminatory tax drives return on Alabama sales below that required by the company

The conclusion is that such a tax can be expected to have significant adverse consequences. Alabama citizens are harmed because of the higher prices, reduced levels of insurance and lower service levels. The competitiveness of the industry is reduced because of higher barriers to entry for foreign firms. Potental domestic firms may receive temporary benefits because price is raised enough to allow these more inefficient firms to compete. However, this small benefit comes at a great cost to citizens of Alabama and the economic efficiency of the industry.

## IV. ECONOMIC ANALYSIS OF THE STATE PURPOSES SUBMITTED BY THE DEFENDANTS

The objective of this section is to analyze from an economic viewpoint the purported purposes of the discriminatory tax on foreign insurers. Fourteen purposes were originally submitted by the state. Three additional purposes were later presented by intervenors in this case. Although most of these purposes are distinct in a narrow sense, it is clear that these 17 purposes really fall into two general categories as follows:

(1) Increase revenues of the state, at the expense of foreign firms.

(2) Benefit the state of Alabama and its citizens by encouraging the creation and growth of domestic insurance companies and inducing investment in the State.

In this section, I will examine these two major purposes. An appendix discusses the seventeen individual purposes separately. Section III, by describing the economic effects one can reasonably expect from imposition of a discriminatory tax on foreign firms, provides the economic foundation for all of the discussion in this section.

### State Purpose

Before proceeding with the analysis of possible purposes of the discriminatory tax, it is useful to look back at the



work done by Paul Alyea in 1965 at the request of Alabama's domestic life insurance industry and under its direction. Dr. Alyea proposed three objectives of the premium tax: "revenue, promotion of domestic companies and securing the largest possible local investment of life insurance savings."[55] His analysis and conclusions are certainly relevant to this case. His major findings are summarized below:[56]

"1. States levy premium taxes and impose other charges on insurance companies primarily for general revenue . . .

2. In every state receipts from insurers are significant, but in Alabama such receipts are of utmost importance to the state's general fund . . .

3. States have not been conspicuously successful in the attainment of nonrevenue objectives."

Mr. Alyea then concludes that the objective of taxation of insurance companies is revenue production. He furthermore states that the taxing scheme has not promoted the domestic industry nor has it been successful in attracting capital through the tax reduction provisions. In fact, he makes a pointed comment particularly relevant to this case:

> ". . . the more certain course to follow in the development of a domestic industry would be to keep the level of rates low along with reasonable rates on foreign companies as opposed to much higher rates on foreign companies."[57]

The rest of this section will discuss the alleged purposes of Alabama's discriminatory tax.

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[55] Alyea, op cit, p. 39

[56] Ibid, p. 46-47

[57] Ibid, p. 47

1. *Increase Revenues of the State (Alabama 14)*

Economic analysis:

In this analysis it is useful to consider the total premium tax imposed on foreign firms as composed of two parts: (1) a premium tax rate equal to the rate charged domestic firms and (2) a discriminatory tax rate.

As discussed in the previous section, price would rise and volume fall upon imposition of a discriminatory tax. Premium tax revenue would then decrease due to the volume adjustment and increase due to the price adjustment resulting in an ambiguous, most likely small, net effect on premium tax revenue. However, discriminatory tax revenue, since foreign firms hold a majority share of Alabama's insurance business and since the discriminatory rate (2% for life companies) is twice as large as the premium tax rate (1%), would more than compensate for any likely effect on premium tax revenue, resulting in a net increase in overall tax revenue for the State of Alabama. The direct cost of this windfall to the state (and the domestic industry), would be the amount of retaliatory taxes imposed on domestic insurers in conducting out-of-state business.

Discussion:

There can be no doubt that the gross premium tax is an important source of revenue to the state. In earlier sections I discussed the importance of the premium tax as a revenue producer for the state of Alabama. Over $65 million in revenue receipts was generated by the gross premium tax for the fiscal year ending September 30, 1980. Premium tax receipts are an important source of funds for the General Fund, generating almost 17% of gross General Fund receipts. The premium tax is the single largest source of funds for the General Fund.



Under the current tax system, the discriminatory tax (levied on foreign companies) is the major contributor to premium tax revenue receipts for the State of Alabama.

Domestic companies wrote $451.7 million in premiums in Alabama in 1979. If we apply a 1% premium tax to this premium volume, we can derive an estimate of the premium tax liability of domestic insurers. (This estimate is likely to overstate the total Alabama premium tax liability of domestic insurers because of the tax credits allowed.) This simplified calculation implies that domestic companies contributed $4.5 million in premium tax revenues to Alabama while foreign companies would have contributed the other $55.5 million. In other words, foreign companies write four times more premiums in Alabama than do domestic companies, while paying more than twelve times the premium taxes that domestic companies pay.

In my opinion, the major purpose served by the current tax system in Alabama is the generation of state revenue at the expense of foreign companies operating in the state.

2. *Benefit the State of Alabama by Encouraging Creation and Growth of Domestic Insurance Companies and Inducing Investment in the State by Foreign Companies (Alabama 1-13, 15-17)*

| | |
|---|---|
| Alabama 1 | to encourage formation of new insurance companies domiciled in Alabama, and gain economic benefits |
| Alabama 2 | to increase competition |
| Alabama 3 | to extend range of customer choice among alternative companies |
| Alabama 4 | to enable young domestic companies to compete |

Alabama 5 to reduce barriers to entry (by domestic companies)

Alabama 6 to encourage more insurance to be sold

Alabama 7 to promote greater level of insurance coverage

Alabama 8 to enhance use of insurance by Alabama families

Alabama 9 to enhance degree to which Alabama families and businesses will insure themselves

Alabama 10 to promote greater use of insurance of all types in rural areas

Alabama 11 to promote higher rate of economic development by inducing foreign companies to invest

Alabama 12 to promote growth and development of domestic insurance industry; to encourage domestic companies to keep home offices in Alabama

Alabama 13 to lessen adverse impact which foreign companies have on economy of Alabama

Alabama 15 to encourage domestic insurance companies to keep their home offices in Alabama

Alabama 16 to promote availability of insurance of all types in all areas of the State of Alabama

Alabama 17 to encourage investments by foreign insurance companies within the State of Alabama

Economic analysis and discussion:

In regard to purpose 2, discriminatory taxation could be expected to help create (Alabama 5) and promote the intrastate growth of (Alabama 4) domestic insurance



companies. Creation of domestic insurance companies might occur because the higher price level which results from the impositon of discriminatory taxes on foreign firms permits inefficient domestic firms to enter. In addition, growth of domestic companies may be promoted because the higher price level raises the profit margin for domestic firms. However, the creation and growth of the domestic industry occurs at a great cost to the consumers of Alabama who experience higher prices, reduced service, and reduced quantity of insurance. In addition, the effects of such taxation would be beneficial *only* for premiums written within the state. Because of retaliatory statutes in other states, out-of-state premiums would suffer taxation at the same high rate as premiums written by foreign firms in Alabama. Thus, although the domestic industry may reap temporary benefits from the high discriminatory tax (at a great cost to the consumers of Alabama), these benefits are eliminated as soon as the domestic firms attempt to conduct business in other states (and yet the cost to Alabama policyholders remains).

Even given that discriminatory taxation could benefit domestic insurance companies (at least initially in their intrastate business), it would seem that this is not a legitimate state purpose in and of itself, but only to the extent that a domestic industry confers disproportionate benefits upon the State of Alabama and its citizens.

In any event, the incremental benefits that the State of Alabama receives from such a handicapped domestic industry seems small relative to the burden imposed upon foreign insurers. For example, the top 10 domestic life insurers have, over decades, built-up less than $31 million in long term investments in home office properties in Alabama. In only one year, Alabama imposes discriminatory taxes of about $17 million on foreign life insurers.

With respect to the benefits that a flourishing domestic industry might confer on the state and its citizens, the

analysis of Section 3 demonstrated that discriminatory taxation is basically an anti-competitive measure in that it results in higher prices, reduced average and aggregate quantities of insurance purchased, reduced numbers of insured, increased barriers to entry for out-of-state companies, and lower levels of customer service. The only result which, in any way, may be construed as adding to the competitiveness of the insurance industry is a possible increase in the number of domestic firms (but this occurs at the expense of foreign firms). Clearly, then, Alabama purposes 2 (more attractive pricing and better service, 6 (increase aggregate quantity of insurance sold in Alabama), 7 (increase average level of insurance coverage in Alabama), 8 (increase number of insured Alabama families), and 9 (increase likelihood of Alabama families and business being insured for property and casualty losses) are economically inconsistent in that discriminatory taxation could only work contrary to these purposes.

With respect to the alleged purpose of increased employment in Alabama resulting from the location of headquarters facilities in the state (Alabama 1), such headquarters would comprise only company officers, support staff, and the actuarial function. Since these functions make up only part of overall company employment, it would seem that this purpose is quite insignificant economically and certainly could not justify such large scale discrimination against foreign firms as exists under the state's current tax statutes.

Another alledged economic benefit of promoting the domestic insurance industry is the supposedly higher level of investment made by domestic versus foreign firms (Alabama 12).

The desired goal in accomplishing this purpose is obviously to increase the level of investment in the State of Alabama. However, there are two perspectives from



which it can be viewed. If the State's motivation is to promote a large interstate business for domestic companies with the presumed derivative benefit of receiving a larger share of total insurance company assets in the form of in-state investments, then this purpose is economically inconsistent. As discussed, discriminatory taxation, while an aid to domestic companies in their intrastate business, works to the detriment of out-of-state expansion, due to the retaliatory statutes of most other states. If, on the other hand, the State's motivation is to maximize the level of investment in Alabama for the intrastate insurance industry, then the ratio of Alabama incremental investment per period to Alabama premiums per period is a far more meaningful statistic, as a measure of a particular insurance company's participation in accomplishing increased in-state investment, than is the proportion of total assets invested in Alabama.

The third column of Exhibit 18 gives the ratio of investments in Alabama real estate and mortgages as of 1979 to 1979 Alabama premiums for the top ten foreign and domestic life insurance companies operating in the State. Clearly this statistic suffers, relative to that discussed above, on grounds of completeness and on grounds that older companies with larger asset bases would tend to have higher such ratios. In regard to the completeness problem, any inherent bias in the statistic would presumably be in favor of domestic companies, as they would tend to invest a relatively higher proportion of their total assets in Alabama real estate and mortgages than their foreign counterparts. In regard to the latter problem, however, any inherent bias would presumably be in favor of foreign companies, which are older on average than domestic companies.

Upon examination of Exhibit 18, it can be seen that foreign companies actually have *far higher* ratios than do domestic companies. If it is the case that the two biases cancel each other out, or that domestics are favored on

net, then it can be concluded that Alabama purpose 12 is economically inconsistent and that the State should actually give *preferential* treatment to foreign companies in accomplishing this purpose. If, on the other hand, it is the case that foreign firms are favored on net in the calculation of this ratio, then nothing can be concluded, as older foreign companies have higher ratios and

**EXHIBIT 18**

**ALABAMA VERSUS OUT-OF-STATE PREMIUM AND INVESTMENT* SHARES FOR TEN LARGEST FOREIGN AND TEN LARGEST DOMESTIC INSURERS IN ALABAMA**

| | Alabama Premiums/ Total Premiums (%) | Alabama Investment/ Total Investment (%) | Alabama Investment/ 79 Alabama Premiums (%) |
|---|---|---|---|
| 1) Equitable | 1.1 | .8 | 293 |
| 2) Aetna | 1.4 | 1.6 | 304 |
| 3) John Hancock | .9 | .9 | 369 |
| 4) Metropolitan | 1.0 | 1.2 | 302 |
| 5) New York Life | 1.6 | 1.7 | 254 |
| 6) National Life & Accident | 3.3 | 2.3 | 139 |
| 7) Prudential | .7 | .6 | 191 |
| 8) State Farm | 3.1 | .7 | 44 |
| 9) Mutual of New York | 1.6 | 1.8 | 397 |
| 10) Independent Life | | 9.5 | 92 |
| 1) Federated Guaranty | 93 | 94 | 71 |
| 2) Liberty National | 52 | 21 | 69 |
| 3) Mutual Savings Life | 73 | 39 | 64 |
| 4) Protective Life | 41 | 90 | 16 |
| 5) Booker T. Washington | 100 | 100 | 159 |
| 6) Life of Alabama | 54 | 96 | 244 |
| 7) Southern United | 61 | 84 | 91 |
| 8) National Security | 77 | 54 | 56 |
| 9) Southern Life | 23 | 35 | 197 |
| 10) Vulcan Life | 25 | 57 | 121 |

* Investments include only real estate owned and mortgages held.



younger domestic companies have improving ratios with the ultimate outcome indeterminate.

Thus, there is absolutely no economic basis for this purpose.

Furthermore, because the interstate growth of the domestic industry is handicapped by the current taxing scheme, domestic companies are not as strong as they might otherwise be. The economy of Alabama experiences a loss in potential benefits that would be derived from a domestic industry with a strong interstate business component. Paul Alyea agreed,

> "One effect has been to keep the personal incomes in Alabama at a lower level than would be reached by an insurance industry enjoying more out-of-state business." [58]

With respect to the alleged purpose of increasing customer choice over both companies and policy types (Alabama 3), it would appear that this purpose is economically consistent in terms of number of firms. It is possible that discriminatory taxation could result in a greater number of firms operating in Alabama, as there would probably be a greater number of small domestic firms entering the market than larger foreign firms exiting. However, a greater number of firms serves no inherent purpose except to the extent of benefits from the presumed greater level of competitiveness in the marketplace, and since discriminatory taxation is anti-competitive, as discussed, this part of Alabama purpose 3 is logically inconsistent. As to greater diversity in policy types available it can only be assumed that the reference is to innovation in policies, since there is no such thing as an insurance patent, i.e., any firm can offer any known type of policy and typically does. Innovation in

[58] Ibid, p. 59.

the insurance industry does not have a spectacular history despite the fact that in the view of Shepard [39], Galbraith [40], and Schumpeter [41] that oligopoly is the industry structure most conducive to innovation, and that the insurance industry has very definite oligopolistic tendencies as discussed in the first section of this analysis. Inhibitors of innovation in the insurance industry such as regulation, consumer distrust, sales force opposition to new products, pressure from reinsurers, opposition from within the industry, lack of ability to copyright or patent policies, etc., seem to offset to a large degree the natural innovative tendencies of an oligopolistic structure in the insurance industry. Further, the limited innovations that have occurred are typically made by large companies. In Murray's study [42] in this regard, of the six innovations in the life industry made since 1960 the lowest in-force ranking of the innovating company was 231st with the next lowest being 140th. In light of the fact that the number of life companies has been in excess of 1400 since 1960 even 231st is well into the upper quartile of life companies by size. Similarly, for the six property and casualty innovations since 1960 the lowest ranking by premium volume of the innovating company was 21st. In summary, innovation has been relatively rare in the insurance industry due to the large number and severity of inhibitors to innovation, and even those innovations which have occurred have been the domain of large companies. Clearly then, there is no logical basis for discriminatory taxation aimed at promoting Alabama's do-

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[39] Shepard, op cit.

[40] Galbraith, op cit.

[41] Schumpeter, op cit.

[42] M.L. Murray, "The Theory and Practice of Innovation in the Private Insurance Industry", *Journal of Risk and Insurance*, December 1976.



mestic insurance industry with the intent of stimulating innovation, as such a tax does nothing to reduce any of the inhibitors to innovation in the industry and as, with one or possibly two exceptions, Alabama's domestic firms are relatively small.

The alleged purpose of promoting greater penetration of the insurance industry into unserved market segments (Alabama 10 and 16) are economically inconsistent. The imposition of discriminatory taxation could certainly do nothing to encourage then existing firms to serve such markets as, if it were not possible to serve them prior to such a tax, increasing the costs of foreign firms could do nothing to improve that situation. Additionally, any domestic firm induced to enter the market by discriminatory taxation would necessarily be less efficient than existing firms as otherwise it would have entered without such taxation. Since serving a particular market could not be profitable for a less efficient firm, if not profitable for a more efficient one, there is no way discriminatory taxation could result in insurance coverage being extended to any of the desired markets.

With respect to the alleged purpose of inducing investment in the State (Alabama 11 and 17), foreign insurers are allowed to reduce their gross premium tax rate .1% for every 1% of investment in the state. Theoretically, this investment inducement scheme raises the expected after-tax return on investments in Alabama. However, realistically, this investment inducing tax scheme can be expected to have no impact on the investment decisions of foreign firms.

First, the reduction of the tax rate is minor relative to investment requirements. Second, the tendency for several states to enact such tax provisions means that it is theoretically impossible for a company operating in all states to enjoy the full tax benefits. Third, even if a

foreign firm invests ten percent of its assets in Alabama, it is still subject to a much higher tax rate than domestic firms.

The total assets of foreign life companies doing business in Alabama amounted to $406 billion in 1979. In order for all of these companies to receive full benefit from the tax reduction law, they would have to collectively invest over $40 billon in Alabama assets. In exchange for this huge investment, these firms could collectively reduce their premium tax liability by $8.4 million. In other words, these firms increase their expected after tax return on Alabama investments by .02%. Suppose insurance companies require a 10% return on investment. This incremental return is certainly such a low amount as not to provide any investment motivation, particularly considering the increased investment risk these firms will face because of reduced diversification of investments.

In addiiton, an investment of $40 billion in Alabama assets might be practically impossible. The amount is so large as to dislocate the functioning of capital markets in Alabama. Forty billion is 9.4% of all assets held by life insurance companies in the United States. It is 1.4 times the amount of government securities held by all life insurance companies. It is 38% of all mortgage investments of all life insurance companies, and it is 3 times the total real estate investment of life insurance companies. In other words, $40 billion is a very, very large number.

It is interesting to ask whether tax reduction provisions have induced foreign firms to invest in Alabama. Exhibit 19 gives the premium tax rate of the largest life insurers doing business in Alabama and Exhibit 20 provides similar information for the largest property and liability insurers. None of these companies receive the full benefit. Many reduce their gross premium tax rate by .1%, implying an investment in Alabama of about 1%



of their assets. In fact, these firms write about 1% of their premiums in Alabama.

About 1.4% of the total personal income generated in the United States is derived from Alabama. In a free economy, one might expect investments of approximately 1% in the State of Alabama. Thus the investment in Alabama cannot be related to the tax reducing investment provisions of the state statute.

Paul Alyea provides similar data for 1964 for all 269 insurers. His data is replicated as Exhibit 21.

**EXHIBIT 19**

**ALABAMA ADMITTED ASSETS OF FOREIGN COMPANIES WITH GREATEST MARKET SHARE**

| | Alabama Investment in ($ millions) | Total Assets ($ millions) | Alabama Total (%) | Gross Tax Rate |
|---|---|---|---|---|
| Equitable | $ 355.9 | $ 30,829 | 1.2 | 2.9% |
| Aetna | 253.2 | 18,548 | 1.4 | 2.9 |
| John Hancock | 234.9 | 17,318 | 1.4 | 2.9 |
| Metropolitan | 583.5 | 44,976 | 1.3 | 2.9 |
| New York Life | 252.5 | 18,479 | 1.4 | 2.9 |
| National Life and Accident | 42.9 | 2,790 | 1.5 | 2.9 |
| Prudential | 102.4* | 54,734 | .2 | 3.0 |
| State Farm | 31.0 | 2,905 | 1.1 | 2.9 |
| Mutual of New York | 87.5 | 7,412 | 1.2 | 2.9 |
| Independent Life and Accident | 34.7 | 6,000 | .6 | 2.5% |
| Total | $1,978.5 | $198,601 | 1.0 | |

* Prudential did not submit a schedule for reduction of premium tax for investments. Its annual statement shows real estate investment in Alabama of $3.7 million and mortgages of $98.7 million. Thus, this understates Alabama assets as measured by Alabama Law.

EXHIBIT 20

PREMIUM TAX RATE OF SELECTED FOREIGN NON-LIFE COMPANIES DOING BUSINESS IN ALABAMA IN 1979 *

| Company | Tax Rate |
|---|---|
| United States Fidelity and Guaranty | 4.0% |
| Insurance Company of North America | 4.0% |
| Aetna Insurance Company | 3.9% |
| Auto-Owners Insurance Company | 3.9% |
| Liberty Mutual Insurance Company | 3.9% |
| State Farm Fire and Casualty | 3.9% |
| State Farm Mutual and Automobile Insurance Company | 3.9% |
| Allstate Insurance Company | 3.8% |
| St. Paul Fire and Marine | 3.7% |

* Source: Alabama Tax Returns. Foreign companies with significant market share in Alabama were selected for review.

EXHIBIT 21

TABLE 3

FREQUENCY DISTRIBUTION APPLICABLE RATES OUT-OF-STATE LIFE INSURERS DOING BUSINESS IN ALABAMA, 1964

| Applicable Rate | Number of Companies | Percent of Total | Cumulative % |
|---|---|---|---|
| 3.0 | 193 | 71.7 | 71.7 |
| 2.9 | 30 | 11.2 | 82.9 |
| 2.8 | 12 | 4.5 | 87.4 |
| 2.7 | 6 | 2.2 | 89.6 |
| 2.6 | 8 | 3.0 | 92.6 |
| 2.5 | 3 | 1.1 | 93.7 |
| 2.4 | 0 | 0 | 93.7 |
| 2.3 | 3 | 1.1 | 94.8 |
| 2.2 | 2 | .7 | 95.5 |
| 2.1 | 0 | 0 | 95.5 |
| 2.0 | 12 | 4.5 | 100.0 |
| | 269 | 100.0 | |

Source: Foreign Companies 1965 Tax Returns to Alabama

This table was reproduced from *Taxation of Life Insurance Companies in Alabama* by Paul Alyea, p. 45.



Mr. Alyea presents his conclusion and a relevant quote from Winston Beard:

> "Since the percentage of assets invested in Alabama to qualify for a partial reduction in applicable rate is very low (1 percent), and since all Alabama investments by foreign insurers can by no means be attributed to a tax reduction provision, and since the maximum premium rate on foreign insurers is quite high in Alabama (3 percent), the effect of this provision must be viewed as quite minimal.
>
> "As additional states provide tax reduction privileges the investment inducement effects must become even smaller. As Beard concludes: 'Just looking at those states that apply their laws to foreign companies and base the tax reduction on the percentage of assets invested, such a company would have to invest 263-⅓% of its assets in these seven states! That is, to say the least, highly unlikely.'" [49]

With respect to the alleged purpose of redressing the adverse impact of companies withdrawing from Alabama a high percentage of premiums collected (Alabama 13), the outflow referred to in this purpose would amount to net premium received less benefits paid, dividends, and increases in investments in Alabama. If this outflow is indeed positive, discriminatory taxation would provide a redress of sorts. However, such an outflow amounts to "out-of-state savings" by Alabama policyholders, which implies that any tax imposed on these funds for the purpose of minimizing them is a direct tax on the savings of Alabama citizens. Taxes of this nature can only be abhorred by any government seeking the best interests of its citizens. Thus, this purpose is not legitimate from a welfare perspective.

[49] Ibid, p. 46.

Finally, with respect to the alleged purpose of encouraging domestic insurance companies to keep their home office in Alabama (Alabama 15), discriminatory taxation is presumably aimed at discouraging Alabama insurance companies with substantial Alabama business from moving their home offices out of the State by threatening them with discriminatory tax rates on their Alabama premiums if they become foreign companies. Clearly only a very few Alabama companies would even give consideration to moving their home offices *out-of-state*, namely those with substantial *out-of-state* business. As discussed earlier, discriminatory taxation benefits intrastate business and inhibits interstate business due to retaliatory statutes in most other states. Imposition of such a tax would induce companies with substantial *out-of-state* business either to shift their emphasis to some degree toward Alabama business and away from *out-of-state* business or vice versa, leading to eventual departure from the State. This latter course is indeed the most likely, as Alabama contains only a small portion of the total U.S. insurance market.

Thus, the purpose is economically inconsistent.

Conclusion

I agree with Dr. Alyea's conclusion of fifteen years ago, that the only purpose served by the discriminatory tax is the production of revenue. I would add that this revenue production comes at the expense of foreign firms. I can see no economic benefits that can be derived from such a discriminatory state tax when the business of insurance is nationwide. In fact, the discriminatory tax has severe harmful economic and competitive consequences, both within Alabama and nationwide. I can see no legitimate State purpose which can be expected to be served by such a harmful tax.



## V. ANALYSIS OF REALISTIC ALTERNATIVES TO THE DISCRIMINATORY TAX

The economic arguements and data in Sections III and IV indicate that the discriminatory tax is harmful to important segments of the domestic industry, to foreign companies, to the economy of Alabama and to the citizens of Alabama.

When the discriminatory tax is ruled unconstitutional by the courts, the legislature will have to enact a new tax program. This discussion considers alternative legislative approaches to taxation of insurance companies.

### Alternative Tax Programs Available to the Legislature

If the discriminatory tax is eliminated, it is unclear what types of tax laws will replace it. It is useful to consider three possible outcomes. These are discussed below:

1. Eliminate discrimination by lowering the foreign tax rate to the domestic rate of 1%.

Premium tax revenues would initially fall by a considerable amount. In the long run, the reduced tax would be passed on to consumers in the form of lower prices, thus stimulating demand and tax revenue receipts.

Under this outcome, both the domestic industry and the foreign industry would benefit. The foreign industry would gain because of the lower tax liability it would incur in Alabama. The domestic industry would benefit in its conduct of interstate business because it would no longer be subject to retaliatory taxes on its out-of-state business.

Despite the attractiveness of this alternative, in reality, this outcome is probably politically unrealistic because of its short term effects of reducing revenues to the state.

2. Eliminate discrimination by raising the domestic rate to the existing foreign rate (3% for life companies and 4% for non-life companies).

This alternative would initally raise additional revenues for the state. An estimate of the incremental revenues generated from the increased tax on domestics calculated below:

Domestic Insurance

| | Premiums $ mil | Increment Tax Rate | Incremental Taxes |
|---|---|---|---|
| Life Premiums | $207.3 | 2% | $ 4,146,000 |
| Accident & Health | 86.1 | 2% | 1,722,000 |
| Property and Liability | 158.1 | 3% | 4,743,000 |
| | | | $10,611,000 |

The state could expect incremental revenues of $10.6 million. There is no tax benefit to the foreign firms. There is, however, some intra-industry economic benefit from putting foreign and domestic firms on an equal basis with respect to taxes. Domestic firms bear the real incremental cost because of an increase in tax liabilities to Alabama with no offsetting reduction in retaliatory tax obligations in other states. The domestic companies will continue to be subject to the retaliatory tax provisions of other states. In addition, on long-term nonparticipating contracts of insurance issued previously, the domestic industry would not be able to raise their prices to recoup these increased costs. It is not surprising that domestic firms would object strongly to this outcome.

3. Eliminate discrimination by charging a compromise tax rate for both domestic and foreign firms.

Under this alternative, it is theoretically possible to find the tax rate that when applied to both domestic premiums and foreign premiums generates approximately the same



level of revenues for the state. This would certainly be a fiscally desirable result.

Without better data, it is difficult to determine exactly what this compromise tax rate might be. However, it certainly will be greater than 1%, but less than 3%, for life companies, and between 1% and 4% for non-life companies.

Assume that the compromise rate was 2.25% for life companies. Foreign companies will benefit because of the reduced tax rate on Alabama business. Domestic companies will bear some costs because of the higher tax liability in Alabama. However, this cost will be offset by the gains resulting from reduced retaliatory taxes in other states. The analysis in Section II showed that the larger domestic companies are already paying somewhere between 2% and 2.5% in total premium taxes. Yet the great bulk of these taxes are being exported to other states.

The economy of Alabama will benefit from the elimination of the discriminatory tax and removal of the handicap on the interstate business of domestic companies. The result should be a stronger domestic industry. Citizens (policyholders) of Alabama will benefit because of the effects of increased competition in the industry.

As stated earlier, Paul Alyea concluded in 1965 that the purpose of taxation of insurance companies in Alabama was the production of revenue for Alabama and that nonrevenue objectives of taxation were not achieved under the existing taxing scheme (which is quite similar to what exists today). He pointed out that the taxing scheme was, in fact, detrimental to the growth and viability of the domestic industry. But, at the same time, he realized that possible conflicts between revenue production and promotion of the domestic industry might exist. He discussed this point in a most enlightening paragraph:

"A state desiring to minimize retaliatory taxes paid by its domestics would have to do more than merely eliminate tax differentials as between domestic and foreign corporations—it would have to keep the general level of insurance taxes no higher than that prevailing in other states. Presumably the states with the lowest level of insurance taxation are those with the highest appreciation of the significane of this industry to their economies. If this is the case, then the more certain course to follow in the development of a domestic insurance business would be to keep the level of rates low along with reasonable rates on foreign companies as opposed to much higher rates on foreign companies. Whether such a policy would conflict with the revenue objective is problematical. Revenue might actually be increased if lower rates in fact resulted in a more than proportional increase in premium volume. Or, if revenue declined, then a choice must be made as between revenue and growth of the domestic insurance industry."

### Conclusion

When the current discriminatory tax is ruled unconstitutional by the courts, the legislature will enact a new, nondiscriminatory tax on insurance companies. As discussed above, there are alternatives to the present discriminatory taxing scheme which will eliminate the adverse economic consequences of the discriminatory law, generate the same level of revenues for the state and stimulate the expansion and growth of the domestic industry.

## VI. Conclusions

In the analysis which supports my testimony, I have reviewed the history of taxation in Alabama, conducted an economic analysis of the expected effects of discriminatory taxation, and evaluated the State purposes that the State of Alabama maintains are served by the discriminatory tax on foreign insurers. I can find no evidence that would lead me to conclude that any purpose is being served other than the raising of revenue for the State at the expense of foreign insurers. This revenue-producing mechanism has several harmful consequences for the State of Alabama and related parties.



(1) Competition in the insurance industry in Alabama is worsened.

(2) Prices of insurance products are higher, and quantity is lower than would otherwise be the case.

(3) The taxing scheme permits less efficient companies to enter. Studies have shown that prices of insurance products are inversely related to firm size.

(4) The full growth and development of the domestic industry is hampered because of the handicap imposed on the out-of-state business of Alabama insurers by the current tax system.

(5) Employment and personal income in Alabama are at lower levels than would exist from a stronger, healthier, and more economically viable insurance industry in Alabama.

In my opinion, there can be no legitimate State purpose that could have been expected to be served by a taxing scheme with such harmful consequences to all parties involved.

## APPENDIX I:

## PREMIUM TAXATION OF LIFE INSURANCE COMPANIES BY STATE

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### APPENDIX I

### STATE TAXATION OF LIFE INSURANCE COMPANIES, 1980

| | Tax Rate On Life & Health | | Tax Rate On Annuities | | | |
|---|---|---|---|---|---|---|
| | Foreign Companies | Domestic Companies | Foreign Companies | Domestic Companies | Income Tax | Retaliatory Tax |
| Alabama | 3%* | 1% | 1% | 1% | No | Yes |
| | Offsets for various taxes. * Reduced for investment in state | | | | | |
| Alaska | 3% | 1.5% | No Tax | No Tax | No | Yes |
| Arizona | 2% | 1% | No Tax | No Tax | No | Yes |
| | Offsets under Guaranty Association Act | | | | | |
| Arkansas | 2.5% | No Tax | No Tax | No Tax | Domestic Only | Yes |
| California | 2.35% | 2.35% | 2.35% | 2.35% | No | Yes |
| | Tax reduced to .5% for qualified pension plans | | | | | |
| Colorado | 2.25%* | 2.25% | No Tax | No Tax | No | Yes |
| | * No tax on premiums from qualified plans. | | | | | |
| Connecticut | 2.0% | 2.0% | No Tax | No Tax | Domestic Only | Yes |
| | Offsets under Guaranty Association Act | | | | | |
| Delaware | 2.0% Additional ($2000 min) | 2.0% | No Tax | No Tax | No | Yes |
| District of Columbia | 2.[illegible]%* | 2.0% | 2.0% | 2.0% | No | Yes |
| Florida | 2.0%* | No Tax | 1.0% | No Tax | Yes | Yes |
| | * Offset for income tax. Tax reduction if regional home office in Florida. | | | | | |
| Georgia | 2.25%* | 2.25%* | 2.25% | 2.25% | No | Yes |
| | * Reduction for investment in state | | | | | |
| Hawaii | 3.197%* 4.282%** | 1.918%* 2.965%** | | | No | No |
| | * Life ** Health | | | | | |
| Idaho | 3.0% | 3.0%* | No Tax | No Tax | No | No |
| | * Rate reduced to 1% for investment in Idaho. No tax on premiums from qualified plans. | | | | | |
| Illinois | 2.0% | No Tax | No Tax | No Tax | Domestic Companies | Yes |
| Indiana | 2.0% | No Tax | No Tax | No Tax | Domestic Companies | Yes |
| Iowa | 2.0% | 2.0% | 2.0% | 2.0% | No | Yes |
| | No tax on premiums and considerations from qualified pension plans. | | | | | |

| | Tax Rate On Life & Health | | Tax Rate On Annuities | | | |
|---|---|---|---|---|---|---|
| | Foreign Companies | Domestic Companies | Foreign Companies | Domestic Companies | Income Tax | Retaliatory Tax |
| Kansas | 2.0% | 1.0%* | 2.0% | 1.0% | No | Yes |
| | No tax on premiums and considerations from qualified pension plans.<br>* Tax reduced for investment in state. | | | | | |
| Kentucky | 2.0% | No Tax* | 2.0% | No Tax | No | Yes |
| | * Intangible personal property tax. | | | | | |
| Louisiana | $140 for first $7000 of premiums.<br>$170 for each additional $10,000.<br>Tax reduction for investment in state. | | | | Yes<br>Offset for Premium Tax | Yes |
| Maine | 2.0% | 1.0% | 2.0% | 1.0% | No | Yes |
| | No tax on premiums and considerations from qualified pension plans. | | | | | |
| Maryland | 2.0% | 2.0% | No Tax | No Tax | No | Yes |
| Massachusetts | 2.0%*<br>*.25% of reserve<br>** Surtax | 2.0%** | No Tax | No Tax | Domestic investment income | Yes |
| Michigan | 2.0% | No Tax | No Tax | No Tax | Domestic only | Yes |
| Minnesota | 2.0% | 2.0% | No Tax | No Tax | Yes, offset for premium tax | Yes |
| Mississippi | 3.0%*# | 1.5%# | 2.0%** | 1.0% | Yes | Yes |
| | * Reduced rate on qualified plans.<br>** No tax on qualified plans, reciprocal basis.<br># Offset for income tax. | | | | | |
| Missouri | 2.0% | 2.0% | 2.0% | 2.0% | No | Yes |
| | Offset for franchise and personal property tax.<br>No tax on qualified plans. | | | | | |
| Montana | 2.75% | 2.75% | No Tax | No Tax | No | Yes |
| | Deduction for investment in state of 50% of capital stock (or 10% assets for mutual). | | | | | |
| Nebraska | 2.0% | 0.6% | 2.0% | 0.6% | Yes, offset for premium tax | Yes |
| | No tax on qualified plans. | | | | | |
| Nevada | 2.0% | 2.0% | 2.0% | 2.0% | No | Yes |
| | No tax on qualified plans.<br>Tax reduced 50% for home office; regional home office offset. | | | | | |
| New Hampshire | 2.0% | 2.0% | No Tax | No Tax | Yes, offset for premium tax | Yes |
| New Jersey | 2.0% | 2.0% | No Tax | No Tax | No | Yes |
| | Rate on group health 1%.<br>No tax on qualified plans.<br>Offset for franchise and personal property taxes. | | | | | |
| New Mexico | 2.5% | 2.5% | No Tax | No Tax | No | No |
| | Reduced to .75% if 40% assets in the state. | | | | | |

APPENDIX I—Continued

| | Tax Rate On Life & Health | | Tax Rate On Annuities | | Income Tax | Retaliatory Tax |
|---|---|---|---|---|---|---|
| | Life & Health | | Annuities | | | |
| | Foreign Companies | Domestic Companies | Foreign Companies | Domestic Companies | | |
| New York | 1.0%, 2.6%* Maximum | 1.0%, 2.6%* Maximum | No Tax | No Tax | 9%* | Yes |
| | * Combined amount of premium tax and income tax not more than 2.6% premium tax. | | | | | |
| North Carolina | 2.5% | 1.5% | 2.5% | 1.5% | No | No |
| | No tax on qualified pension plans. | | | | | |
| North Dakota | 2.5% | No Tax | No Tax | No Tax | Domestic only | Yes |
| Ohio | 2.5% | No Tax | No Tax | No Tax | No | Yes |
| Oklahoma | 4.0%* | No Tax | No Tax | No Tax | Domestic only | Yes |
| | Reduced to 3-½% if 2% of assets invested in the state to no tax for 30% assets invested in the state. | | | | | |
| Oregon | 2.25% | No Tax | No Tax | No Tax | Domestic only | Yes |
| | Offset under Guaranty Association Act. | | | | | |
| Pennsylvania | 2.0% | 2.0% | No Tax | No Tax | Domestic only | Yes |
| Rhode Island | 2.0% | 2.0% | No Tax | No Tax | No | Yes |
| South Carolina | 3.0% 1.0% addit. | 2.0% | No Tax | No Tax | No | Yes |
| | Rate reduced for investment in the state. | | | | | |
| South Dakota | 2.5% | .75% | 1.25% | 0.5% | No | Yes |
| | No tax on qualified pension plans. Tax reduced for regional home office, office property tax offset. | | | | | |
| Tennessee | 2.0% $150 min. | 1.75% $150 min. | 1.5% | 1.5% | Yes, offset for premium taxes | Yes |
| | No tax on qualified pension plan. | | | | | |
| Texas | 1.8% | 1.1% | No Tax | No Tax | No | Yes |
| | Rate reduced for investment in the state. Rate reduced to 55/80 of 1% if total premium income less than $450,000. | | | | | |
| Utah | 2.25% | 2.25% | No Tax | No Tax | No | Yes |
| | Property tax offset. | | | | | |
| Vermont | 2.0% | 2.0% | No Tax | No Tax | No | Yes |
| | Offset under Guaranty Association Act. | | | | | |
| Virginia | 2.25% Life 2.75% Health | 2.25% Life 2.75% Health | No Tax | No Tax | No | Yes |
| | Offset under Guaranty Association | | | | | |
| Washington | 2.0% | 1.0% | No Tax | No Tax | No | Yes |
| | No tax on qualified pension plans. | | | | | |

APPENDIX I—Continued

| | Tax Rate On Life & Health | | Tax Rate On Annuities | | | |
|---|---|---|---|---|---|---|
| | Foreign Companies | Domestic Companies | Foreign Companies | Domestic Companies | Income Tax | Retaliatory Tax |
| West Virginia | 3.0%<br>1.0% addit. | 3.0%<br>1.0% addit. | 1.0% | 1.0% | No | Yes |
| | If 25% of assets in the state, 1% additional tax is not imposed. | | | | | |
| Wisconsin | 2.0% | 2.0% | No Tax | No Tax | Yes | Yes |
| Wyoming | 2.5%* | 1.5%* | 1.0% | 1.0% | No | Yes |
| | 1% if 25% of assets invested in the state.<br>.5% if 50% in the state.<br>No tax on qualified plans. | | | | | |

*Source:* *American Council Of Life Insurance Premium Tax Manual*



## APPENDIX II:

## TECHNICAL ECONOMIC ANALYSIS OF DISCRIMINATORY TAX ON FOREIGN INSURERS

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### APPENDIX II
### ECONOMIC ANALYSIS

The life insurance industry in the State of Alabama, and throughout the United States, can be characterized as exhibiting the attributes of monopolistic competition. The basic tenets of this type of structure are: 1) each firm has some limited monopoly power, i.e. a downward sloping demand function, and 2) there are so many firms competing in the marketplace that the actions taken by a single company have minimal or no effect on the actions of any other.

The direct effect of discriminatory taxation is to increase the cost curves for foreign companies relative to those of domestic companies, either existing or potentially entering. For the purpose of analyzing the indirect effects on the industry of these cost increases, the industry can be characterized as an oligopoly comprising three firms, i.e. foreign, existing domestic, and potential domestic, as discriminatory taxation affects all firms within a particular group in the same way. (A potential domestic firm is a firm which has not yet entered the industry because its cost curve lies everywhere above its demand curve, i.e. in figure 1, $AC_3 > D_{max}$ for all volumes.) Each such firm may be considered a composite of all firms in its group or as a representative of its group at the reader's option.

Figure 1 illustrates the direct effect of discriminatory taxation on the foreign firm in that both its average and marginal cost curves (from $AC_1$ to $AC_2$ and $MC_1$ to $MC_2$) are raised, as well as the indirect effects of increased price ($P_1$ to $P_2$) and decreased quantity ($Q_1$ to $Q_2$).

These induced price-quantity shifts arise from the leftward movement of the intersection of the firm's marginal cost (MC) and marginal revenue (MR) curves.

Since this "grouped" industry is oligopolistic, both the existing and potential domestic firms experience an upward shift of their demand curves due to the reduction in quantity of the foreign firm induced by the tax. For the existing domestic firm, the intersection of its marginal cost (MC) and marginal revenue (MR) curves shifts to the right (Figure 2) resulting in a price increase ($p_{1a}$ to $p_{1b}$) and a quantity increase ($q_{1a}$ to $q_{1b}$). The potential domestic firm, which previously suffered from the debilitating problem of its average cost curve lying everywhere above its demand curve, becomes a new domestic firm upon imposition of the tax as the upward shift in its demand curve permits profitable entry. (Figure 3).

In aggregate terms, then, the domestic firms are induced by discriminatory taxation to increase quantity while the foreign firm is induced to decrease quantity. All three firms, however, are induced to increase price. Figure 4 illustrates the industry equilibrium. The unanimous increase in price implies an upward shift of the industry supply curve, thereby inducing a lower aggregate quantity of insurance sold ($q_1$ to $q_2$). Note that these industry curves are necessarily based on industry indices of some sort as the prices and quantities of the three firms are not necessarily homogeneous.

The readily apparent induced effects of discriminatory taxation are as follows:

1) higher prices—as discussed

2) reduced aggregate quantity—as discussed

3) reduced numbers of insured and reduced average quantity—if aggregate quantity decreases one of these must decrease, logical that both decrease



4) increased barriers to entry by foreign firms—margin reduced

5) lower levels of customer service by foreign firms—demand curve not perfectly inelastic so tax cannot be totally passed on in form of price increase, thus margin is squeezed causing contraction of service level

6) possible entry by domestic firms—if potential firms, as illustrated in Figure 3, exist

7) possible exit by foreign firms—if cost increases drive return on Alabama sales below that required by the company

Note that the cost curves drawn in Figures 1, 2 and 3 exhibit constant returns to scale. Most academic studies show that the life insurance industry exhibits constant to increasing returns to scale. However, if the industry truly could be characterized by increasing returns to scale there would eventually be only one insurance company in existence due to inevitable cost-cutting mergers. However, the exact opposite result has occurred over the last one hundred years with the number of companies increasing rapidly through the late 1960's. (There has been little change in the number of life companies since 1968.). Thus, constant returns to scale seems to be the most appropriate assumption.

Note, also, that the ultimate oligopolistic equilibrium will be oscillatory and not limited to one demand shift for the domestic firms as implied in the discussion, i.e., the actions taken by domestic firms in response to their experienced shift in demand as discussed will induce a subsequent shift in the demand curve facing the foreign firm, etc. This oscillation will continue until final equilibrium, if possible, is reached. The discussed equilibrium, then, should be considered a post-oscillatory result.

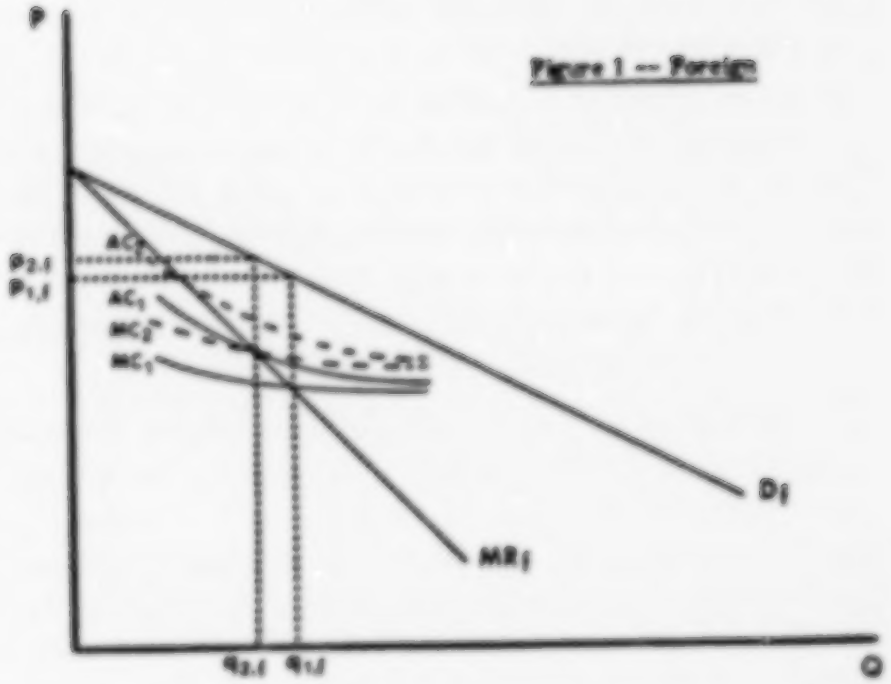



Figure 1 -- Foreign

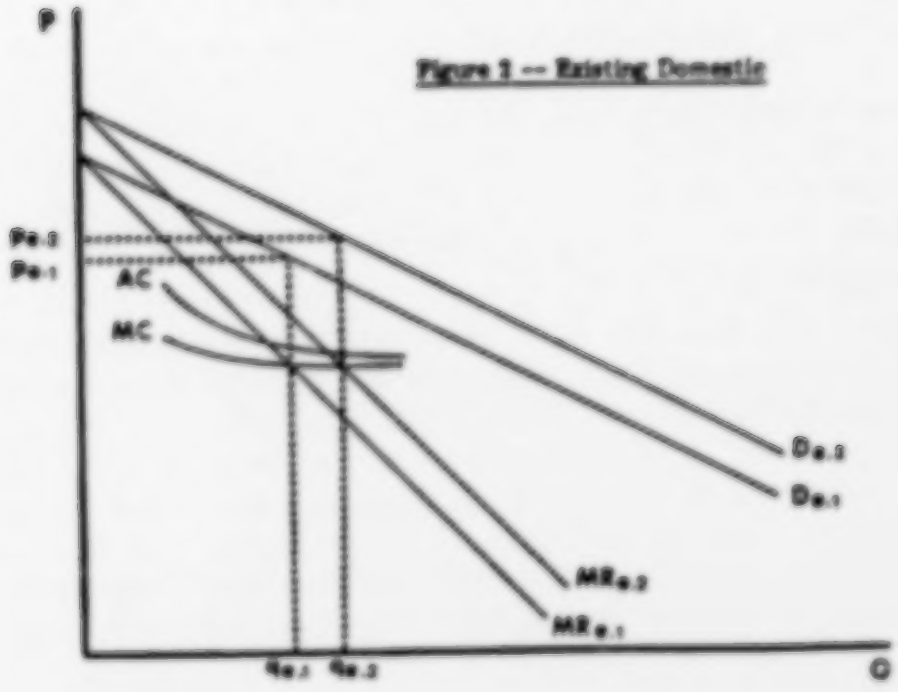



Figure 2 -- Existing Domestic



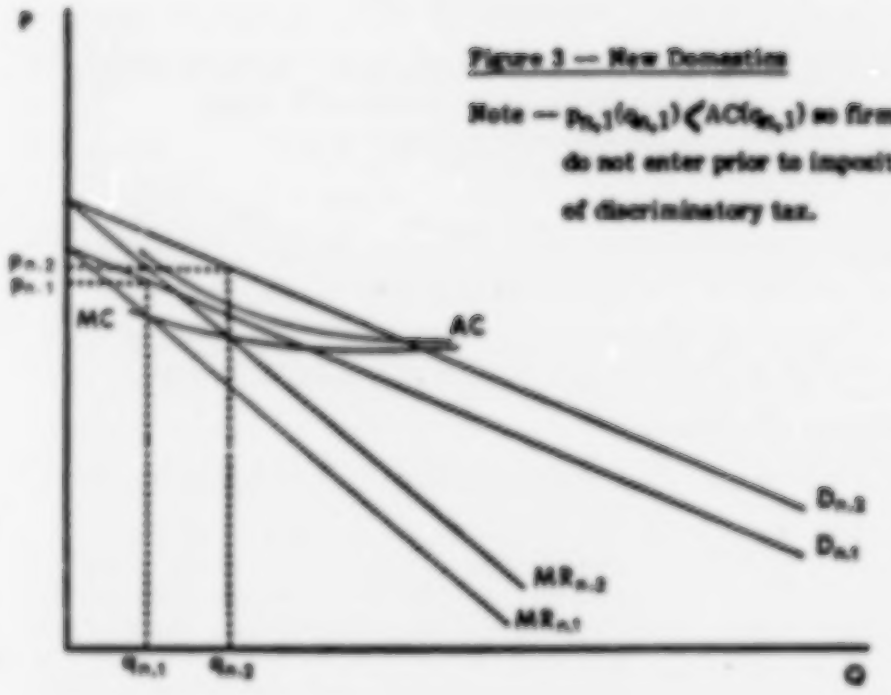



Figure 3 -- New Domestics

Note -- $P_{n,1}(q_{n,1}) < AC(q_{n,1})$ so firms do not enter prior to imposition of discriminatory tax.

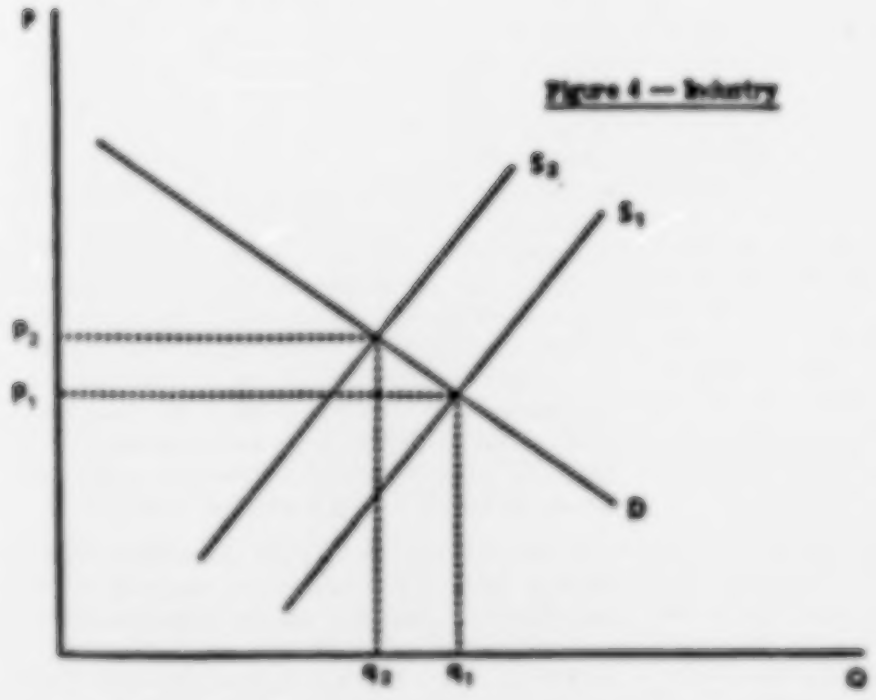



Figure 4 -- Industry

# APPENDIX III:

# INDIVIDUAL ANALYSIS AND DISCUSSION OF THE 17 ALLEGED PURPOSES OF THE DISCRIMINATORY TAX

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## APPENDIX III

### LIST OF LEGITIMATE STATE PURPOSES OF STATE OF ALABAMA FILED MARCH 9, 1982

| Reference | Purpose |
|---|---|
| | 1) List of State purposes filed on March 8, 1982. |
| Alabama 1 | a) To encourage the formation of new insurance companies domiciled within Alabama, thereby gaining the economic benefits that the added job opportunities, employment, and payrolls can provide to the Alabama communities in which such headquarters facilities may be located. |
| Alabama 2 | b) To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on an equal footing with well-established, out-of-state companies. The existence of viable domestic insurance companies adds a new and important source of competition for large, nationally-known companies; having both foreign and domestic companies in vigorous competition with each other for customer patronage, makes the insurance marketplace more contestable and increases the likelihood that all insurance companies (both foreign and domestic) will have to provide more attractive rates and levels of service to the general public. |
| Alabama 3 | c) To extend the range of customer choice among alternative insurance companies. The existence of healthy, viable domestic insurance companies gives the general public a wider range of both companies and types of policies to choose from in selecting what kinds of insurance coverage and insurance service best suits their needs. |



| Reference | Purpose |
|---|---|
| Alabama 4 | d) To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies. |
| Alabama 5 | e) To reduce the barriers to entry into the insurance industry. |
| Alabama 6 | f) To encourage more insurance to be sold in Alabama, with the result that more Alabama citizens gain access to the many benefits that adequate insurance protection provides. |
| Alabama 7 | g) To promote a greater level of average insurance coverage per family in Alabama. |
| Alabama 8 | h) To enhance the use of insurance by Alabama families. |
| Alabama 9 | i) To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, accidents, and other such calamities as may render them debilitating financial losses. To the extent that differential premium tax policies can be used to create a domestic insurance industry that, in turn, enhances competition in the property and casualty insurance industry in Alabama, then the more likely it is that Alabama families and Alabama businesses will be attracted to insure themselves adequately against insurable types of calamities. The benefits and protection that such coverage affords rebounds to the benefit of the general public and lessens the burden that calamities might otherwise impose on state and local governments and thus upon Alabama taxpayers. |
| Alabama 10 | j) To promote greater use of insurance of all types in rural and sparsely populated sections of Alabama—market segments which usually are ignored by large, foreign companies but which may well be attractive to small, domestic companies if concentrating on such "vacant niches" can be made economically feasible. |

| Reference | Purpose | |
|---|---|---|
| Alabama 11 | k) | To promote a higher rate of economic development in the state of Alabama. The provision of the Alabama law that allows the premium taxes of foreign insurance companies to be reduced .1% for each 1% of their admitted assets invested in Alabama is intended as an incentive for foreign companies to increase their Alabama investments above what they might otherwise elect to invest in Alabama. The objective of using premium tax incentives to attract added amounts to investment capital to Alabama is a particularly useful and potentially important economic benefit, given Alabama's long-standing position as a low-income, relatively undeveloped state. |
| Alabama 12 | l) | To promote growth and development of a domestic insurance industry, thereby realizing the general economic and public benefit that derives from the fact that domestic insurance companies typically invest a far higher percentage of their admitted assets in Alabama than do foreign companies. Alabama's efforts to achieve economic parity with other, more economically-advanced states is materially enhanced by differential premium taxation because of the general practice of domestic insurance companies to direct significantly higher percentages of their investment capital to in-state projects. Domestic insurance companies are therefore a very important source of capital for financing projects that benefit the citizens of Alabama and that contribute to a faster rate of economic growth within the state. |
| Alabama 13 | m) | To lessen the adverse impact which foreign insurance companies have on the economy of Alabama. Foreign insurance companies collect far more insurance premiums from Alabama policyholders than they reinvest in Alabama. By channeling the premiums collected in Alabama to investments and purposes outside of Alabama, the activities of foreign insurance companies have an adverse impact on economic growth within the State —much needed funds are being withdrawn |



| Reference | Purpose | |
|---|---|---|
| | | from the State's economy at the very time when such funds are desperately needed to help boost economic activity within the State. In contrast, it is well known that domestic insurance companies, on average, reinvest a far higher proportion of their admitted assets in Alabama than do foreign companies. One of the purposes of differential premium taxation in Alabama is thus to help redress the adverse impact which foreign companies have on the State's economy as concerns the use of the premium income they obtain in Alabama and their relative disinclination to invest in Alabama's underdeveloped economy. Achieving a higher degree of economic parity with the rest of the states in the United States has for many years been one of the State's foremost goals. |
| Alabama 14 | n) | To raise revenues for the State of Alabama. |
| Alabama 15 | 2) | To encourage domestic insurance companies to keep their home offices in Alabama. |
| Alabama 16 | 3) | To promote the availability of insurance of all types in all areas of the State of Alabama. |
| Alabama 17 | 4) | To encourage investments by foreign insurance companies within the State of Alabama. |

## ALABAMA PURPOSE 1

**Encourage formation of new insurance companies domiciled in state of Alabama with resultant economic benefits for communities in which headquarters facilities may be located.**

As discussed in section III, discriminatory taxation does provide encouragement for the formation of new domestic insurance companies. A direct economic benefit of such new firms would be the location of new headquarters facilities in Alabama. However, since such a headquarters would comprise only company officers, support staff and the actuarial function, and since these functions make up a very small percentage of overall company em-

ployment, it would seem that accomplishing this purpose would be quite insignificant economically, and certainly could not justify such large scale discrimination against foreign firms as now exists in the state.

In addition the potential contribution to the economy of Alabama would be much greater if the tax scheme were changed. As Dr. Alyea stated,

> An effect has been to keep the total of personal means in Alabama at a lower level than would be reached by an insurance industry enjoying more out-of-state business. Such an industry would be more profitable, thus permitting more employment at higher salary levels with larger dividends. (p. 59)

## ALABAMA PURPOSE 2

**Promotion of domestic insurance industry through discriminatory taxation will increase competition in state's insurance industry with resulting benefits of more attractive pricing and better service.**

As discussed in section III, discriminatory taxation is an anticompetitive measure resulting in both increased prices and lower levels of service. Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 3

**Purports that discriminatory taxation that adversely impacts foreign companies doing business in the state will promote a "healthy, viable domestic" industry resulting in a wider range of customer choice over both companies and policy types with resultant benefits to Alabama citizens.**

This purpose would appear to be economically consistent in terms of numbers of firms, in that it is possible that discriminatory taxation could result in a greater number



of firms operating in Alabama, as there would probably be a greater number of small domestic firms entering the market than larger foreign firms exiting. However, a greater number of firms serves no inherent purpose except to the extent of benefits from the presumed greater level of competitiveness in the marketplace, and since discriminatory taxation is anti-competitive, as discussed, this part of purpose 10 is logically inconsistent. As to greater diversity in policy types available, it can only be assumed that the reference is to innovation in policies, since there is no such thing as a life insurance patent, i.e., any firm can offer any known type of policy and typically does. Innovation in the insurance industry does not have a spectacular history despite the fact that in the view of Shepard,[1] Galbraith,[2] and Schumpter[3] that oligopoly is the industry structure most conducive to innovation, and that the insurance industry has very definite oligopolistic tendencies as discussed in section III. Inhibitors of innovation in the insurance industry such as regulation, consumer distrust, sales force opposition to new products, pressure from reinsurers, opposition from within the industry, lack of ability to copyright or patent policies, etc., seem to offset to a large degree the natural innovative tendencies of an oligopolistic structure in the insurance industry. Further, the limited innovations that have occurred are typically made by large companies. In Murry's study[4] in this regard, of the six innovations in the life industry made since 1960 the lowest in-force ranking of the innovating company was 231st with the next lowest being 140th. In light of the fact that the

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[1] W.G. Shepard, *Market Power and Economic Welfare* (New York: Random House, 1970).

[2] Ibid., p. 57.

[3] *Capitalism, Socialism, and Democracy*, (New York: Harper and Row, 1942).

[4] M.L. Murray, "The Theory and Practice of Innovation in the Private Insurance Industry, *Journal of Risk and Insurance*, December 1976.

number of life companies has been in excess of 1400 since 1960, even 231st is well into the upper quartile of life companies by size. Similarly, for the six property and casualty innovations since 1960 the lowest ranking by premium volume of the innovating company was 21st. In summary, innovation has been relatively rare in the insurance industry due to the large number and severity of inhibitors to innovation, and even those innovations which have occurred have been the domain of large companies. Clearly then, there is no logical basis for discriminatory taxation aimed at promoting Alabama's domestic insurance industry with the intent of stimulating innovation, as such a tax does nothing to reduce any of the inhibitors to innovation in the industry and as, with one or possibly two exceptions, Alabama's domestic firms are relatively small.

## ALABAMA PURPOSE 4

**Make it economically feasible for young, small domestic companies to compete with large, well established foreign companies.**

As discussed in section III, the imposition of a discriminatory tax induces an increase in the price level for insurance. This translates into increased profits for existing domestic companies in terms of both higher prices and increased volumes, and into entry for those potential domestic firms which are too inefficient to enter at lower, more competitive prices. However, this purpose is not a legitimate purpose in and of itself as implied by the state in including it in its list of legitimate purposes, but only to the extent of derivative benefits to the State of Alabama and its citizens.

Yet it has been shown in earlier discussions that there are no economic benefits that result from the entry of small, inefficient firms. And, in fact, the discriminatory tax has adverse economic consequences in the form of higher prices, reduced quantity and lower levels of service.



## ALABAMA PURPOSE 5

**Reduce barriers to entry.**

Obviously, imposing a discriminatory tax on foreign firms does not reduce any of the barriers to entry they may face, which implies that this purpose is economically inconsistent in their regard.

Presumably, however, the intent of this purpose is to reduce barriers to entry for domestic firms. As discussed in section III, the imposition of a discriminatory tax induces an increase in the overall price level for insurance. Such a price increase is certainly an encouragement, although not a guarantee, for domestic firms to enter the insurance market, and, if potential domestic firms, which are able to profitably enter at the new higher price level, exist, new domestic firms will be formed. However, new domestic entrants into the market serve no legitimate purpose except to the extent of derivative benefits to the State of Alabama and its citizens. Thus, this purpose is not a legitimate purpose in and of itself as implied by the state in including it in its list of purposes.

Finally, it is inconceivable that penalizing more efficient firms so that a less efficient firm can enter the industry can, in any way, be construed as reducing a barrier to entry. Thus, this purpose is economically inconsistent as well.

## ALABAMA PURPOSE 6

**To increase quantity of insurance sold in Alabama.**

As discussed in section III, discriminatory taxation would result in an increase overall price level for insurance and lower levels of service. In response to higher prices and lower levels of service insurance, purchasers by less insurance, not more. Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 7

**To increase average level of insurance coverage per Alabama family.**

As discussed in section III, the two primary effects of discriminatory taxation, increased prices and lower levels of service, can in no way be construed as inducements to insured Alabama families to increase their level of insurance coverage. In fact, the inverse is the only result that could be expected from discriminatory taxation, i.e., that some families would reduce their level of coverage. Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 8

**To increase number of Alabama families covered.**

As discussed in section III, the two primary effects of discriminatory taxation, increased prices and lower levels of service, can in no way be construed as inducements to uninsured Alabama families to purchase insurance. In fact, the inverse is the only result that could be expected from discriminatory taxation, i.e. that some insured families would drop their coverage. Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 9

**To the extent that discriminatory taxation increases competition, and to the extent that increased competition increases the likelihood of Alabama families and businesses being insured for property and casualty losses, the burden of such calamities on Alabama taxpayers will be reduced.**

As discussed in section III, two of the effects of discriminatory taxation are increased prices and lower level of customer serivce. Thus, regardless of the relative



numbers of firms previous to and subsequent to the imposition of such a tax, the results of the tax are anti-competitive, which implies a decrease in competition, not an increase.

Further, since discriminatory taxation is anti-competitive it could only be expected, as discussed in Alabama Purposes 6, 7 and 8, to result in lower aggregate insurance coverage in the state, lower average coverage level per family, and fewer numbers of insured families, respectively, i.e., the effect of such taxation could only have been expected to be a decrease in the likelihood of Alabama families and businesses being adequately insured for property and casualty losses, thereby actually increasing the state burden in the event of such calamities. Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 10

**To promote greater penetration by the insurance industry into unserved market segments.**

The introduction of discriminatory taxation could certainly do nothing to encourage then existing firms to serve such markets as, if it was not profitable to serve them prior to such a tax, increasing the costs of foreign companies could do nothing to improve that situation. Additionally, any domestic firm induced to enter the market by discriminatory taxation would necessarily be less efficient than existing firms as otherwise it would have entered without such taxation. Since serving a particular market could not be profitable for a less efficient firm, if not profitable for a more efficient one, there is no way discriminatory taxation could have been expected to result in insurance coverage being extended to any of the desired markets. Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 11

**To promote a higher rate of economic development in the state of Alabama by inducing, through a premium tax reduction scheme, foreign firms to increase their level of investments in the state.**

To promote a higher rate of economic development in the State of Alabama by inducing, through a premium tax reduction scheme, foreign firms to increase their level of investments in the state.

Discriminatory taxation, as defined in Alabama, does make investment in Alabama relatively more attractive to foreign firms in that any premium taxes saved as a result of such investments provide an incremental return to the investments. To the extent that this incremental return influences the investment decisions of foreign firms in favor of Alabama, foreign investment in the state will increase. However, the extent of any such influence could only be negligible as, to take full advantage of Alabama's reduction scheme, foreign life companies alone in 1979 would have had to invest $60.6 billion in Alabama investments. This amount is 1.4 times the amount of all federal government securities held by these companies in 1979, and over ninety percent of the total amount of life insurance in force in Alabama in 1979. Clearly, such severe investment requirements for premium tax relief could in no way be expected to accomplish this stated purpose, even without considering the effects of similar tax statues in numerous other states. The investment incentive results in a savings in premium taxes of about $6.4 million for life companies. To obtain the $19 million savings, firms must invest over $60 billion in Alabama. This implies that the effect of the tax reduction scheme is to increase the expected after-tax return on investments in Alabama by .02%. In exchange for this miniscule benefit, companies give up the benefits of diversification and thus the safety



of their assets is severely damaged. If companies were negligent enough to use this investment incentive, policyholders and stockholders would be harmed. Actually, there are indications that discriminatory taxation on the whole has worked adversely to this purpose in inhibiting foreign involvement in the state, as the top ten foreign companies by premium volume invested only 1% of their total assets in Alabama investments in 1979 despite the fact that Alabama's GNP was 1.4% of U.S. GNP in that year.

As an additional note, the negative incentive aspects of this scheme amount to nothing short of corporate "blackmail."

## ALABAMA PURPOSE 12

**Promote growth of domestic insurance industry as domestic firms typically invest a far higher percentage of their admitted assets in Alabama than do foreign companies.**

The desired goal in accomplishing this purpose is obviously to increase the level of investment in the State of Alabama. However, there are two perspectives from which it can be viewed. If the state's motivation is to promote a large interstate business for domestic companies with the presumed derivative benefit of receiving a larger share of total insurance company assets in the form of in-state investments, then this purpose is economically inconsistent. As discussed in section IV, discriminatory taxation, while an aid to domestic companies in their intrastate business, works to the detriment of out-of-state expansion due to the retaliatory statutes of most other states. If, on the other hand, the state's motivation is to maximize the level of investment in Alabama for the intrastate insurance industry, then the ratio of Alabama incremental investment per period to Alabama premiums per period is a far more meaningful

statistic, as a measure of a particular insurance company's participation in accomplishing increased in-state investment, than is the proportion of total assets invested in Alabama.

The third column of exhibit 18 in section IV gives the ratio of investments in Alabama real estate and mortgages as of 1979 to 1979 Alabama premiums for the top ten foreign and domestic life insurance companies by premium volume operating in the state. Clearly this statistic suffers, relative to that discussed above, on grounds of completeness and on grounds that older companies with larger asset bases would tend to have higher such ratios. In regard to the completeness problem, any inherent bias in the statistic would presumably be in favor of domestic companies as they would tend to invest a relatively higher proportion of their total assets in Alabama real estate and mortgages than their foreign counterparts. In regard to the latter problem, however, any inherent bias would presumably be in favor of foreign companies which are older on average than domestic companies. Upon examination of exhibit 18, it can be seen that foreign companies actually have *far higher* ratios than do domestic companies. If it is case that the two biases cancel each other out or that domestics are favored on net, then it can be concluded that Alabama Purpose 12 is economically inconsistent and that the state should actually give *preferential* treatment to foreign companies in accomplishing this purpose. If on the other hand, it is the case that foreign firms are favored on net in the calculation of this ratio, then nothing can be concluded as older foreign companies have higher ratios and younger domestic companies have improving ratios with the ultimate outcome indeterminate.

Thus, there is absolutely no economic basis for this purpose.



## ALABAMA PURPOSE 13

**Redresses adverse impact on local economy of foreign companies withdrawing from Alabama a high percentage of the premiums they collect.**

The outflow referred to in this purpose would amount to net premiums received less benefits paid, dividends and increases in investments in Alabama. If this outflow is indeed positive, discriminatory taxation would provide a redress of sorts. However, such an outflow amounts to "out-of-state savings" by Alabama policyholders, which implies that any tax imposed on these funds for the purpose of minimizing them is a direct tax on the savings of Alabama citizens. Taxes of this nature can only be abhorred by any government seeking the best interests of its citizens. Thus, this purpose is not legitimate from a welfare perspective.

Another important consideration is that because of the high discriminatory tax on foreign firms and the existence of retaliatory tax laws in 47 states, domestic companies are exporting tax dollars to other states. It is certainly inconsistent for the State of Alabama to, on one hand, redress premium outflow through its tax laws and with the same law cause premium outflow by domestic companies in the form of higher tax dollars paid to other states.

## ALABAMA PURPOSE 14

**To raise revenues for State of Alabama.**

As a rhetorical device, consider the total premium tax rate imposed on foreign firms to be composed of two parts, namely a premium tax rate equal to the domestic rate and a discriminatory rate. As discussed in section III, price could be expected to rise and quantity decline upon imposition of discriminatory taxation. Premium

tax revenue would then decrease due to the quantity adjustment and increase due to the price adjustment resulting in an ambiguous, probably small, net effect on premium tax revenue. However, discriminatory tax revenue, since foreign firms hold a majority share of Alabama's insurance business, and since the discriminatory rate (2%) is twice as large as the premium rate (1%), would more than compensate for any likely effect on premium tax revenue, resulting in a net increase in overall tax revenue for the state. As shown earlier, foreign companies write four times more premiums in Alabama than do domestic firms, while paying more than twelve times the premium taxes that domestic companies pay.

However, while this purpose is economically consistent and the beneficial results economically substantial, the price paid by the State of Alabama and its citizens is prohibitatively high. Discriminatory taxation results in higher prices for insurance, lower volumes written, lower levels of service, the payment by domestic companies of retaliatory taxes in most other states, higher barriers to domestic companies in out-of-state expansion in the form of increased retaliatory taxes, and reduced efficiency in market allocation of premium and investment funds.

## ALABAMA PURPOSE 15

**To encourage domestic insurance companies to keep their home offices in Alabama.**

In this regard, discriminatory taxatioe is presumably aimed at discouraging Alabama insurance companies with substantial Alabama business from moving their home offices out of the state by threatening them with discriminatory tax rates on their Alabama premiums if they become foreign companies. Clearly only a very few Alabama companies would even give consideration to moving their home offices out of state, namely those with substantial out-of-state business. As discussed in section IV, discriminatory taxation benefits intrastate business and inhibits interstate business due to retaliatory statutes in most other states. Imposition of such a tax would induce companies with substantial out-of-state business to either shift their emphasis to some degree toward Alabama business and away from out-of-state business or vice versa leading to eventual departure from the state. This latter course is indeed the most likely as Alabama contains only a small portion of the total U.S. insurance market.



Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 16

**To promote the availability of insurance of all types in all areas of the State of Alabama.**

This purpose is identical to Alabama Purpose 10 with the exception that "all areas" replaces "rural and sparsely populated sections," and the relevant economic discussion is identical as well.

The introduction of discriminatory taxation could certainly do nothing to encourage existing firms to enter unserved markets as, if it was not profitable to serve them prior to such a tax, increasing the costs of foreign companies could do nothing to improve that situation. Additionally, any domestic firm induced to enter the market by discriminatory taxation would necessarily be less efficient than existing firms as otherwise it would have entered without such taxation. Since serving a particular market could not be profitable for a less efficient firm, if not profitable for a more efficient one, there is no way discriminatory taxation could have been expected to result in insurance coverage being extended to any of the desired markets. Thus, this purpose is economically inconsistent.

## ALABAMA PURPOSE 17

**To encourage investments by foreign insurance companies within the State of Alabama.**

Since discriminatory taxation can in no way be construed as an inducement for foreign firms to invest in Alabama except through Alabama's premium tax reducing scheme, this purpose is identical to Alabama Purpose 11, and the relevant economic discussion is identical as well.

Discriminatory taxation, as defined in Alabama, does make investment in Alabama relatively more attractive to foreign firms in that any premium taxes saved as a result of such investments provide an incremental return to the investments. To the extent that this incremental return influences the investment decisions of foreign firms in favor of Alabama, foreign investment in the state will increase. However, the extent of any such influence could only be negligible as, to take full advantage of Alabama's reduction scheme, foreign life companies alone in 1979 would have had to invest $40.6 billion in Alabama investments. This amount is 1.4 times the amount of all federal government securities held by these companies in 1979, and over ninety percent of the total amount of life insurance in force in Alabama in 1979. Clearly, such severe investment requirements for premium tax relief could in no way be expected to accomplish this stated purpose, even without considering the effects of similar tax statutes in numerous other states. The investment incentive results in savings in premium taxes of about $19 million for life companies. To obtain the $19 million savings, firms must invest over $40 billion in Alabama. This implies that the effect of the tax reduction scheme is to increase the expected after-tax return on investments in Alabama by .05%. In exchange for this miniscule benefit, companies give up the benefits of diversification and thus the safety of their assets is severely damaged. If companies were negligent



enough to use this investment incentive, policyholders and stockholders would be harmed. Actually, there are indications that discriminatory taxation on the whole has worked adversely to this purpose in inhibiting foreign involvement in the state, as the top ten foreign companies by premium volume invested only 1% of their total assets in Alabama investments in 1979 despite the fact that Alabama's GNP was 1.4% of U.S. GNP in that year.

As an additional note, the negative incentive aspects of this scheme amount to nothing short of corporate "blackmail".

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

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Civil Action No. CV-81-994-Th [*et al.*]

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation, [*et al.*],
*Plaintiffs,*

—vs—

HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, [*et al.*],
*Intervenors.*

---

**ORDER**

Pursuant to the directions of the Court at the status conference held on March 21, 1982, Plaintiffs, Defendant and the Intervenors have filed their separate Motions for Summary Judgment in Civil Action No. 81-994-Th and in Civil Action No. 81-996-Th.

A final hearing will be held on May 10, 1982, as to all issues before the Court other than the specific amount of taxes paid by each of the Plaintiffs, and the sufficiency and timeliness of the steps taken by the Plaintiffs in perfecting their appeals, unless the facts relating thereto are stipulated prior to the hearing.

The cause will be submitted to the Court on May 10, 1982, at 9:00 a.m. on the pleadings therein; the Lists submitted by Defendant Forrester and the Intervenors,



respectively, containing every conceivable purpose relied upon by the Defendant and Intervenors which the Legislature of the State of Alabama may have had in the passage of Sections 27-4-4 and 27-4-5, Code of Alabama 1975; the Plaintiffs' Responses thereto; the Affidavits which shall be submitted by the Parties on or before May 3, 1982; Briefs of the Parties to be filed on or before May 5, 1982; and any stipulations of the Parties.

It is further ORDERED by consent of the Parties that this Court's decision in Civil Action No. 81-994-Th will be applicable to and dispositive of each of the cases brought by life insurance companies consolidated hereunder. The issues and evidence submitted in the above referenced Civil Action No. 81-944-Th will be considered as if it were presented in like manner in each of the cases brought by life insurance companies consolidated hereunder.

It is further ORDERED by consent of the Parties that this Court's decision in Civil Action No. 81-996-Th will be applicable to and dispositive of each of the cases brought by property and casualty insurance companies consolidated hereunder. The issues and evidence submitted in the above referenced Civil Action No. 81-996-Th will be considered as if it were presented in like manner in each of the cases brought by property and casualty insurance companies consolidated hereunder.

DONE this 5th day of May, 1982.

/s/ H. R. Thomas
CIRCUIT JUDGE

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

Civil Action No. 81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of Insurance
of the Department of Insurance of the
State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, *et al.*,
*Intervenors.*

[Filed May 7, 1982]

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff responds to Defendant's Motion for Summary Judgment by stating that Defendant is not entitled to a summary judgment in his favor and, as further response, Plaintiff incorporates as if set out in full herein Plaintiff's Motion for Summary Judgment and the Affidavits and Brief filed in support of that motion.

/s/ Richard F. Allen
RICHARD F. ALLEN
Attorney for Plaintiff

OF COUNSEL:

CAPELL, HOWARD, KNABE & COBBS, P.A.
57 Adams Avenue
Post Office Box 2069
Montgomery, Alabama 36197
(205) 262-1671

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IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

Civil Action No. 81-996-Th

THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE
COMPANY, a New Jersey corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of Insurance
of the Department of Insurance of the
State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, *et al.*,
*Intervenors.*

[Filed May 7, 1982]

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff responds to Defendant's Motion for Summary Judgment by stating that Defendant is not entitled to a summary judgment in his favor and, as further response, Plaintiff incorporates as if set out in full herein Plaintiff's Motion for Summary Judgment and the Affidavits and Brief filed in support of that motion.

/s/ Richard F. Allen
RICHARD F. ALLEN
Attorney for Plaintiff

OF COUNSEL:

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Montgomery, Alabama 36197
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IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. 81-994-Th

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,
*Plaintiff,*

v.

THARPE FORRESTER, as Commissioner of Insurance
of the Department of Insurance of the
State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY,
an Alabama corporation, *et al.*,
*Intervenors.*

[Filed May 7, 1982]

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**PLAINTIFF'S RESPONSE TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S AMENDMENT TO MOTION FOR SUMMARY JUDGMENT**

Plaintiff responds to Defendant's Response to Plaintiff's Motion for Summary Judgment by stating:

1. Plaintiff timely filed the affidavits in support of its Motion for Summary Judgment by filing them with the Clerk of this Honorable Court on May 5, 1982, the date provided by the Court as the date such affidavits should be filed in its instructions on March 21, 1982, and its Order dated May 5, 1982; and



2. According to the material before this Court on which the case is submitted, Plaintiff is entitled to summary judgment in its favor.

Additionally, Plaintiff amends its Motion for Summary Judgment as follows:

By deleting the name "Mr. Roy Hansen," in paragraph 2, line 4, and inserting in its place the name of "William J. Howard."

/s/ Richard F. Allen
RICHARD F. ALLEN
Attorney for Plaintiff

OF COUNSEL:

CAPELL, HOWARD, KNABE & COBBS, P.A.
57 Adams Avenue
Post Office Box 2069
Montgomery, Alabama 36197
(205) 262-1671

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IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

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Civil Action No. 91-996-Th

THE PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation,
*Plaintiff,*

v.

TRACY FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama,
*Defendant,*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation, *et al.*,
*Intervenors.*

[Filed May 7, 1992]

---

**PLAINTIFF'S RESPONSE TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff responds to Defendant's Response to Plaintiff's Motion for Summary Judgment by stating:

1. Plaintiff timely filed the affidavits in support of its Motion for Summary Judgment by filing them with the Clerk of this Honorable Court on May 5, 1992, the date provided by the Court as the date such affidavits should be filed in its instructions on March 21, 1992, and its Order dated May 5, 1992; and

2. According to the material before this Court on which the case is submitted, Plaintiff is entitled to summary judgment in its favor.



/s/ Richard F. Allen
RICHARD F. ALLEN
Attorney for Plaintiff

OF COUNSEL:
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(205) 262-1671

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IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

---

Civil Action No. CV-81-996

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a New Jersey corporation,
*Appellant/Plaintiff*

vs

HONORABLE THARPE FORRESTER, as Commissioner of Insurance of the Department of Insurance of the State of Alabama
*Appellee/Defendant*

AMERICAN EDUCATORS LIFE INSURANCE COMPANY, an Alabama corporation; BOOKER T. WASHINGTON LIFE INSURANCE COMPANY, an Alabama corporation; FEDERATED GUARANTY LIFE INSURANCE COMPANY, an Alabama corporation; LIBERTY NATIONAL LIFE INSURANCE COMPANY, an Alabama corporation; and SOUTHERN UNITED LIFE INSURANCE COMPANY, an Alabama corporation

*Intervenors*

[Filed May 10, 1982]

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**AFFIDAVIT OF**
**ALFRED E. HOFFLANDER, Ph.D.**

Before me the undersigned authority in and for said County in said State personally appeared Alfred E. Hofflander, who being by me first duly sworn deposes and says:



1. My name is Alfred E. Hofflander. I am employed by the Graduate School of Management at UCLA as Professor of Finance and Insurance. I reside at 1725-C Selby Avenue, Los Angeles, California. Attached as Exhibit A to this affidavit is a copy of my resume, reflecting my education, training, experience and qualifications.

2. At the request of counsel for the plaintiff I made an analysis of the affidavits of Dr. Arthur A. Thompson, Jr., Dr. George A. Overstreet, Jr., Ira L. Burleson, and Phillip E. Stano. Attached as Exhibit B to this affidavit is my rebuttal of the aforementioned affidavits. The analyses, conclusions, and opinions reflected in Exhibit B are my own.

3. In preparing this economic analysis, I have drawn upon academic background in finance and insurance, previous research on state taxation of insurance companies, and accepted principles of economics. In addition, I have conducted some empirical work on the Alabama insurance industry and the state taxation of domestic and foreign insurance companies in Alabama.

4. All publications cited in Exhibit B are in my opinion authoritative, standard and trustworthy. All insurance industry data are taken from standard sources, all population and economic data are drawn from standard government sources, and both represent to the best of my judgment the best available evidence on the subjects in question.

/s/ Alfred E. Hofflander
ALFRED E. HOFFLANDER

[Subscription Omitted in Printing]

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## EXHIBIT A:

## BIO-BIBLIOGRAPHY OF ALFRED E. HOFFLANDER, Ph.D.

[*Omitted*]



## EXHIBIT B:

## TESTIMONY OF ALFRED E. HOFFLANDER, Ph.D.

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The purpose of this document is to present my rebuttal of the economic analyses of the discriminatory tax imposed by Alabama on foreign insurance companies doing business in Alabama made by Arthur A. Thompson, Jr., Ph. D. and by George A. Overstreet, Jr., Ph. D. for the defendants, and presented to the court on May 5, 1982.

The major conclusion of these rebuttals is that both the analyses of Dr. Thompson and Dr. Overstreet as well as their conclusions are totally without basis in fact or in economic logic in regard to each and every state purpose they address.

This document is organized into two sections:

I. Rebuttal of the Analysis of Arthur A. Thompson, Jr., Ph. D.

II. Rebuttal of the Analysis of George A. Overstreet, Jr., Ph. D.

Note that all parenthetical references in the text of this document are references to the Affidavit of Alfred E. Hoffander, Ph. D., Exhibit B, May 4, 1982. Such references are of the form: (pg. ——).

## SECTION I:

### REBUTTAL OF THE ANALYSIS OF ARTHUR A. THOMPSON, JR., PH. D.

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### ALABAMA PURPOSE 1

**To encourage the formation of new insurance companies domiciled within Alabama, thereby gaining the economic benefits that the added job opportunities, employment, and payrolls can provide to the Alabama communities in which such headquarters facilities may be located.**

As I have previously discussed, discriminatory taxation does provide encouragement to the formation of new domestic firms (pg. III-4), as well as for foreign firms to exit the Alabama market. However, such new domestic firms would necessarily be small and inefficient, as otherwise they would have entered the market without such a tax. Additionally, the numbers of entrants, if positive, would be expected to be relatively small as the encouragement offered, while possibly significant, is definitely not overwhelming.

In Dr. Thompson's analysis he shows that the share of U.S. insurers domiciled in the twenty-four states with explicitly discriminatory tax statutes has increased from 59.8% in 1960 to 67.2% in 1980. He deems this result proof of the efficacy of discriminatory taxation in attracting insurers to become domiciled in discriminatory states However, what he fails to point out is that these twenty-four states had less than 50% of life insurance in force in 1980, and that less than 50% of new insurance in 1980 was issued in those states (the exact numbers were 46.5% and 47.3%, respectively, in 1979). Since premiums written out of these 24 states by companies domiciled therein are certainly less than premiums written in



these states by companies domiciled thereout (some of the top 10 U.S. insurers are domiciled in these states), the obvious conclusion is that these companies are definitely smaller than average. Dr. Thompson's more detailed analysis points out the inefficiency of such new firms. In explaining the actual decline in the number of Alabama domiciled insurance companies from 60 to 55 between 1960 and 1981, he points out that there were an ample number of formations to bear out his point of discriminatory taxation stimulating new formations, but neglects to emphasize that there were 35 mergers, 51 failures and 2 relocations over this period.

In regard to the numbers of new domestic formations alone, Dr. Thompson's 67.2% share of life companies domiciled in the 24 explicitly discriminatory states in 1980 is seemingly impressive. However in 1979 this figure was 66.8% for all 24 states but only 31.2% for 22 of these states excluding Arizona and Texas. It is readily apparent that, whatever is responsible for 67.2% of U.S. life companies being domiciled in these states, it has to do with the attractiveness of Texas and Arizona as states of domicile, and not to do with discriminatory taxation. In summary then, Dr. Thompson's statistics, despite superficial appearances to the contrary, bear out the results of my analysis, i.e. any such new domestic firms would be, at best, small in number, smaller than average in size, and inefficient.

As regards the benefits of such formations in terms of additional headquarters facilities being located in Alabama, Dr. Thompson's data shows that 15 domestic companies, including the 3 largest life insurers, provided 2,671 headquarters jobs with corresponding payroll of $43.7 million. It should be noted that, while $43.7 million seems substantial, headquarters payroll typically amounts to little more than 10% of total compensation paid by insurance companies. Further, of the 2,671 jobs and $43.7 million in headquarters payroll, 1,781 and

$32.1 MM, respectively, are provided by the largest 3 companies listed. It is apparent that the bulk of any such benefits are provided by a few large companies which are actually increasingly induced by Alabama's discriminatory tax statute to move their domicile out-of-state as the out-of-state portion of their business increases, due to the increasing amount of retaliatory taxes they must pay. Additionally, since discriminatory taxation inhibits the interstate business of domestic firms due to retaliatory taxes, in the absence of such taxation Alabama insurers would enjoy more out-of-state business, thereby increasing profitability and firm size, and resulting in actually higher levels of employment for and compensation to Alabama citizens than currently exist.

## ALABAMA PURPOSE 2

**To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on an equal footing with well-established, out-of-state companies. The existence of viable domestic insurance companies adds a new and important source of competition for large, nationally-known companies; having both foreign and domestic companies in vigorous competition with each other for customer patronage, makes the insurance marketplace more contestable and increases the likelihood that all insurance companies (both foreign and domestic) will have to provide more attractive rates and levels of service to the general public.**

Dr. Thompson's arguments in regard to this purpose amount to little more than specious platitudes. As I have discussed (pg. III-5), the economic results of discriminatory taxation are anticompetitive and it could only result in higher prices and lower levels of service than would exist in its absence. A possible increase in the number of firms operating in the marketplace is the only result of



discriminatory taxation that could be construed as making the market more competitive. However, adding to the number of firms only makes the market more competitive if the participants are permitted to freely compete. Discriminatory taxation amounts to improving the competitiveness of a horse race by tying together the legs of the fastest horses.

Dr. Thompson seems to feel that the dwindling domestic share of life premiums (exclusive of Blue Cross and Blue Shield) between 1955 and 1980 is proof that the Alabama insurance market has been made more competitive by discriminatory taxation. I have no idea how he is able to arrive at this deduction, but what is apparent from the dwindling domestic share is that the legs of the fastest horses weren't tied tightly enough together.

## ALABAMA PURPOSE 3

**To extend the range of customer choice among alternative insurance companies. The existence of healthy, viable domestic insurance companies gives the general public a wider range of both companies and types of policies to choose from in selecting what kinds of insurance coverage and insurance service best suits their needs.**

As I have previously discussed (pg. III-6), discriminatory taxation is an anticompetitive measure, whether or not it has a positive effect on the number of firms operating in Alabama; and, due to the absence of insurance patents, can provide no increased dispersion of policy types based on preferential treatment of domestic firms.

However, Dr. Thompson apparently views this purpose from a different perspective and addresses the benefits of discriminatory taxation in regard to types of companies, e.g. mutual aid, fraternal, etc., and types of insurance coverage, e.g. credit life, ordinary life, etc. He makes multiple comments such as:

> "A particular contribution of domestic insurance companies is their potential for understanding and catering to local needs and local situations; where desirable, they can specialize in policies and coverages, to fit specific market needs and/or regulatory requirements. Foreign companies may have neither the flexibility nor the inclination to emphasize particular policies and services for limited market segments within a state or group of counties or a community."

that have absolutely no basis in logic or in fact. Apparently, Dr. Thompson feels that domestic firms have the ability as "good ole boys" to offer customized insurance policies. In fact, the expertise, financial power, and regulatory knowledge required to operate in this way are far more likely to reside in larger, mostly foreign firms, if it resides anywhere at all.

As to dispersion over types of companies in terms of foreign versus domestic domicile, he points out that domestic firms hold a major share of the Alabama market for industrial ($1,000 or less) insurance, and uses this as an example of the disparity of product mix between foreign and domestic companies. In fact, it is likely that discriminatory taxation is the cause of domestic dominance in this type of coverage, as due to the lower relative profitability of industrial coverage, such taxation has forced foreign firms from this market which they once served on a large scale.

ALABAMA PURPOSE 4

**To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies.**

On this purpose Dr. Thompson and I agree, in that discriminatory taxation does permit smaller domestic firms



to compete with larger foreign firms as I have previously discussed (pg. III-6). However, aiding domestic firms in their competitive efforts is not a legitmate purpose, as stated. There can certainly be no support for advancing a domestic industry solely on the basis of the fact that it is domestic. In fact, there are substantial grounds for not advancing a domestic industry simply because it is domestic. Discriminatory taxation results in higher prices for insurance, lower quantities, lower levels of service; and, actually inhibits the domestic industry in any efforts toward out-of-state expansion due to retaliatory taxes in other states.

ALABAMA PURPOSE 5

**To reduce the barriers to entry into the insurance industry.**

Discriminatory taxation does not reduce barriers to entry into the Alabama insurance market for foreign firms. What it does is raise barriers to competition for foreign firms, thereby allowing small, inefficient domestic firms to enter the insurance market. However, Dr. Thompson and I agree that new domestic firms may be formed as a result of discriminatory taxation, as it is possible that the number of small domestic firms entering the market may exceed the number of larger foreign firms exiting.

Dr. Thompson cites statistics that 83 new domestic companies have obtained licenses to do business in Alabama between 1960 and 1981, but once again fails to emphasize that over this same period there were 35 mergers, 51 failures, and 2 relocations out-of-state. This statistical evidence forms ample indictment of a policy such as discriminatory taxation which encourages inefficient companies to be formed. Such new inefficient companies obviously cannot compete, and yet the anticompetitive by-products of discriminatory taxation, e.g. higher insur-

ance prices, remain as a burden to Alabama insureds as the number of Alabama companies continues to stagnate.

Finally, as is true of Alabama purpose 4, this is not a legitimate purpose as stated, as there can be no logical or economic support for a policy which encourages the formation of domestic companies as an end in itself.

## ALABAMA PURPOSE 6

**To encourage more insurance to be sold in Alabama, with the result that more Alabama citizens gain access to the many benefits that adequate insurance protection provides.**

As I have previously discussed (pg. III-10), discriminatory taxation results in a lower aggregate volume of insurance sold than would otherwise be the case. Dr. Thompson fails to consider the obvious economic forces at work in this regard but merely cites two statistics. He states that between 1955 and 1980 life insurance in force in Alabama has grown at 10.2% versus 9.4% for the U.S., and between 1966 and 1980 property and casualty premiums in Alabama grew at 13.1% versus 12.1% for the U.S. Based on these two statistics he asserts that discriminatory taxation has resulted in increased quantities of insurance being sold in Alabama.

As is evident in this case, careless use of statistics can lead to totally erroneous conclusions. Aggregate insurance purchases are highly correlated with aggregate personal income which rose in Alabama at a rate of 9.1% between 1960 and 1979 relative to the corresponding U.S. rate of 8.4%. To correct Dr. Thompson's figures for growth in personal income, it suffices to simply subtract the difference in income growth rates from Alabama's growth rates for aggregate life insurance in-force and property and casualty premiums. As corrected, Dr. Thompson's statistics now show that life insurance in-



force in Alabama grew at 9.5% versus 9.4% for the U.S. between 1955 and 1980. Thus, Alabama's level of coverage grew at roughly the average rate for the U.S. over these periods after correction for Alabama's above average growth in personal income. However, it would be expected that Alabama exceed the U.S. average in these regards as, due to improvements in interstate communication, transportation, etc., it would be expected that dispersion of all economic levels of activity, including insurance coverage, over states would decline, i.e. relatively undeveloped states such as Alabama would be expected to grow at rates above U.S. averages with economically advanced states growing at rates below U.S. averages. The obvious conclusion is that discriminatory taxation has retarded growth in aggregate coverage in the state in that this growth rate would be expected to significantly exceed the U.S. average, much as was the case for growth in Alabama personal income.

In any event, whatever growth in aggregate coverage in Alabama has occurred has fallen to foreign insurers as is evidenced by their increased share of total life premiums written (exclusive of Blue Cross and Blue Shield) in Alabama from 61.5% in 1955 to 74.9% in 1980. Since discriminatory taxation works to the detriment of foreign firms it is apparent that this observed growth has occurred despite such taxation and clearly not because of it. This result adds further weight to the argument that discriminatory taxation has retarded growth in coverage in the state, holding it to lower levels than would have been obtained in its absence.

## ALABAMA PURPOSE 7

**To promote a greater level of average insurance coverage per family in Alabama.**

As I have previously discussed (pg. III-11), analysis of the economic principles involved leads to the conclusion

that discriminatory taxation could only lead to lower levels of average insurance coverage per family in Alabama. Once again Dr. Thompson seemingly ignores these principles and bases his arguments solely on a few carefully chosen statistics. He mentions that the average amount of life insurance in-force per capita in Alabama increased at 9.1% between 1955 and 1980 versus 8.0% for the U.S. Correcting these statistics for relative growth in personal income per capita (9.2% in Alabama versus 7.3% for U.S.) by subtracting the difference between Alabama and U.S. growth rates in personal income per capita from the Alabama figure of 9.1% gives 9.2% for Alabama versus 9% for the U.S. Thus, Alabama's life insurance in-force per capita is growing at roughly the U.S. average despite the fact that Alabama, as a relatively undeveloped state in the past, would be expected to show a growth rate in this regard significantly in excess of the U.S. average (as has been the case for personal income) based on the expected ongoing decrease in interstate dispersion over economic activity levels due to advances in interstate communication, transportation, etc. as discussed in purpose 6. The obvious conclusion is that discriminatory taxation has retarded growth in Alabama's average coverage per family below levels that would otherwise have been attained.

As further proof of the relative increase in average level of insurance coverage per family, Dr. Thompson notes that Alabama ranks 29th in average coverage per family but only 40th in per capita disposable income. This comparison is much like comparing apples and oranges as family size in Alabama is larger than the U.S. average which biases such comparisons in favor of Alabama's average coverage per family ranking relative to its per capita disposable income. A much more appropriate comparison in these regards is to compare Alabama's rank in terms of life insurance in-force versus its rank in terms of total personal income. In regard to the former, Alabama ranked 22nd in 1978, while in regard to the latter, she ranked 23rd which results indeed belie the huge beneficial results of discriminatory taxation in these regards implied by Dr. Thompson's apples and oranges comparison. The average ranking for life insurance in-force for the 24 states employing discriminatory taxation in 1978 was 25.21 while the corresponding average ranking for total personal income was a slightly higher 25th (Exhibit 1).



In any event, whatever growth in average coverage per family in Alabama has occurred has fallen to foreign insurers as is evidenced by their increased share of total life premiums written (exclusive of Blue Cross and Blue shield) in Alabama from 61.5% in 1955 to 74.9% in 1980. Since discriminatory taxation works to the detriment of foreign firms it is apparent that this observed growth has occurred despite such taxation and clearly not because of it. This result adds further weight to the argument that discriminatory taxation has retarded growth in average coverage per family in the state, holding it to lower levels than would have been obtained in its absence.

EXHIBIT 1

| | Life In-Force Rank (1978) | Personal Income Rank (1978) | Income Rank RelativeTo In-Force Rank |
|---|---|---|---|
| Alabama | 22 | 23 | lower |
| Alaska | 48 | 48 | same |
| Arizona | 30 | 31 | lower |
| Arkansas | 34 | 33 | higher |
| Florida | 9 | 9 | same |
| Hawaii | 36 | 38 | lower |
| Illinois | 4 | 4 | same |
| Indiana | 10 | 11 | lower |
| Kansas | 29 | 29 | same |
| Kentucky | 26 | 24 | higher |
| Maine | 40 | 40 | same |
| Michigan | 7 | 7 | same |
| Mississippi | 32 | 32 | same |
| Nebraska | 33 | 35 | lower |
| North Carolina | 14 | 13 | higher |
| Ohio | 6 | 6 | same |
| Oklahoma | 27 | 27 | same |
| Oregon | 31 | 28 | higher |
| South Carolina | 28 | 30 | lower |
| South Dakota | 47 | 47 | same |
| Texas | 3 | 3 | same |
| Washington | 23 | 18 | higher |
| Wisconsin | 16 | 15 | higher |
| Wyoming | 50 | 49 | higher |
| Average Rank | 25.21 | 25.00 | |



## ALABAMA PURPOSE 8

**To enhance the use of insurance by Alabama families.**

As I have previously discussed (pg. III-12), analysis of the economic principles involved leads to the conclusion that discriminatory taxation could *only* lead to reduced numbers of insureds in Alabama. Dr. Thompson once again relies solely on carefully selected statistics to make his arguments and once again confuses the issues. His data indicate that between 1960 and 1980 Alabama life policies per capita have always exceeded similar values for the U.S. as a whole, and implied in this data is that Alabama growth in life policies per capita has occurred at 1.2% over this period versus only .6% for the U.S.

This excess number of life policies per capita lies totally in the relatively excessive use of industrial life in Alabama and when Dr. Thompson's figures are recalculated net of such policies it is immediately evident that the Alabama number of ordinary, group, and credit life policies per capita is below the U.S. average over the entire period between 1960 and 1980 with values of 1.45 for Alabama and 1.5 for the U.S. in 1979. Further, the higher growth rate for numbers of policies net of industrial of 3.4% indicates that industrial insurance is declining in popularity in Alabama as for the U.S. as a whole.

As to growth in numbers of policies per capita in Alabama relative to that for the U.S. as a whole, it is apparent, when the overall Alabama growth rate (including industrial) of 1.2% is corrected for the .9% differential excess growth of personal income per capita in Alabama relative to the U.S. yielding an adjusted growth rate of .3%, that Alabama's overall growth rate for policies per capita that is attributable to non-income per capita influences, e.g. discriminatory taxation, is lower than that for the U.S. as a whole. This result clearly

indicates the detrimental effect of discriminatory taxation on the number of insureds in Alabama.

Comparison of the Alabama net growth rate betwen 1960 and 1980 (net of .9% due to increasing personal income over the period) for policies per capita excluding industrial policies with that for the U.S., 2.5% versus 2% respectively, shows that Alabama is growing faster in this regard than the U.S. as a whole. However, this result is not a benefit of discriminatory taxation but due to the relatively belated decline in use of industrial life in Alabama with the state in effect "catching up" in converting from industrial to other types of life insurance.

## ALABAMA PURPOSE 9

**To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, accidents, and other such calamities as may render them debilitating financial losses. To the extent that differential premium tax policies can be used to create a domestic insurance industry that, in turn, enhances competition in the property and casualty insurance industry in Alabama, then the more likely it is that Alabama families and Alabama businesses will be attracted to insure themselves adequately against insurable types of calamities. The benefits and protection that such coverage affords rebounds to the benefit of the general public and lessens the burden that calamities might otherwise impose on state and local governments and thus upon Alabama taxpayers.**

As I have previously discussed (pg. III-13), the economics of discriminatory taxation would work directly to the contrary of this purpose, in that it would serve to reduce the numbers of Alabamans insured for property



and casualty losses due to the higher prices and lower levels of service associated with such taxation.

Dr. Thompson arguments, as to the benefits of discriminatory taxation in increasing competitiveness in the marketplace resulting in increased purchases of property and casualty insurance, once again amount to no more than the irrelevant oration of economic platitudes as discriminatory taxation is, in fact, an anticompetitive measure. He cites one of the same statistics that he cited in his analysis of Alabama purpose 6 and the same counterarguments apply. Briefly, while true that property and casualty premiums in Alabama grew at a rate of 12.1% between 1966 and 1980 compared to 12.2% for the U.S., the Alabama growth rate adjusted for its excess growth rate in personal income is only 12.4%, which is roughly comparable to the U.S. rate. Additionally, it would be expected that a state such as Alabama, that was relatively underveloped economically in 1966, would show a growth rate in this regard, since that time, significantly in excess of that for the U.S. as a whole, as discussed in my rebuttal to Dr. Thompson's analysis of Alabama purpose 6.

## ALABAMA PURPOSE 10

**To promote greater use of insurance of all types in rural and sparsely populated sections of Alabama—market segments which usually are ignored by large, foreign companies but which may well be attactive to small, domestic companies if concentrating on such "vacant niches" can be made economically feasible.**

As I have previously discussed (pg. III-14), discriminatory taxation could not result in service being extended to markets unserved prior to its imposition. If various markets are not served by existing companies it is because it is unprofitable to serve them. Adding to the costs of foreign firms does nothing to increase the profit-

ability of these markets to existing domestic firms much less to any new domestic firms, induced to enter the market by discriminatory taxation, as they are, by definition, less efficient than existing domestics or they would have entered the market without such taxation.

Dr. Thompson argues that a lower premium tax rate for domestic firms is one means whereby the state can encourage the extension of insurance into unserved areas. This may be true but is would be true for foreign firms as well. There is absolutely no basis for discrimination against foreign firms in this regard.

As proof of the efficacy of promoting domestic firms in accomplishing this purpose, Thus, Dr. Thompson presents a veritable plethora of data illustrating the greater percentage of foreign insurance agents in Alabama that work in urbanized areas (69.5%) as opposed to their domestic counterparts (49%). Clearly, in terms of logistics alone, rural and sparsely populated areas are more costly to serve than urban areas resulting in lower profit margins for premiums written in these areas. Since foreign firms must pay premium taxes at a rate 2% higher than domestic firms, it is apparent that they would tend to emphasize the more profitable urban areas and withdraw from areas in which profitability is reduced below required levels by such oppressive taxation. Dr. Thompson's observations as to the dispersion of foreign insurance agents across the state are based on the situation after 25 years (the duration in 1980 of Alabama's current discriminatory period) of tax discrimination and are certainly not an appropriate basis on which to justify it.

Thus, his analysis of Alabama purpose 10 has no basis whatsoever in logic or economic fact.



## ALABAMA PURPOSE 11

**To promote a higher rate of economic development in the state of Alabama. The provision of the Alabama law that allows the premium taxes of foreign insurance companies to be reduced .1% for each 1% of their admitted assets invested in Alabama is intended as an incentive for foreign companies to increase their Alabama investments above what they might otherwise elect to invest in Alabama. The objective of using premium tax incentives to attract added amounts to investment capital to Alabama is a particularly useful and potentially important economic benefit, given Alabama's long-standing position as a low-income, relatively underdeveloped state.**

As I have previously discussed (pg. III-15), discriminatory taxation, as defined in Alabama, does make investment in Alabama relatively more attractive to foreign firms in that any premium taxes saved as a result of such investments provide an incremental return to the investments. The question is the significance of this incremental return in influencing the investment policies of foreign firms. To take full advantage of Alabama's reduction scheme in 1979 foreign firms would have had to invest $40.6 billion in Alabama investments resulting in an incremental return from premium tax savings of .02%. In return for this incredibly miniscule gain these firms would be sharply less diversified in their investment holdings, involving prohibitively increased risks in their portfolios, i.e., the additional risks associated with their investment portfolio would far outweigh a paultry additional return of .02%. Another consideration is the impossibility of fully complying with such schemes in all discriminatory states, e.g. 10 states with tax structures like Alabama's would collectively require 100% of such firms admitted assets to be invested therein.

Dr. Thompson argues that because Alabama's reduction scheme is more reasonable than the totally incredibly

absurd schemes of Georgia, Louisana and West Virginia, that it is realistic. In fact, as discussed above, it is merely incredibly absurd. As proof of how realistic Alabama's reduction scheme is, he notes that 221 foreign companies, out of over 1,000 doing business in Alabama, enjoyed a reduced premium tax rate through this scheme in 1980. In fact, based on investment in proportion to the relative level of economic activity in Alabama as measured by the Alabama's GNP relative to U.S. GNP, (1.4% in 1979) it would be expected that life companies operating in Alabama would all have invested roughly 1.4% of the assets in Alabama in 1980, implying that they would all enjoy tax relief. Of course, not all foreign firms would invest exactly 1.4% % of their assets in Alabama, but based on the above criterion it would be expected that the average premium tax rate of foreign life companies in 1980 would be roughly 2.86% (i.e., 3-1.4 X .1). As Dr. Thompson gratifingly illustrates in his analysis, in 1980 (assuming the 531 foreign firms operating in Alabama in 1979 is not too misleading an estimate of this number in 1980) there were roughly 426 foreign firms enjoying no premium tax relief with the remaining 105 foreign firms enjoying such relief as given by Dr. Thompson's data. The actual average premium tax rate paid by these firms in that year was 2.95%. Clearly, Alabama's reduction scheme could only be construed as an inducement to foreign investment in the state to the extent that the average premium tax rate paid by foreign insurers in 1980 was less than would have been inferred based on level of economic activity in Alabama alone. Since the actual average rate of 2.95% is significantly greater than the rate of 2.86% which could have been inferred, as discussed above, it can only be concluded that Alabama's premium tax reduction scheme has absolutely no beneficial influence on the investment policies of foreign firms and, in fact, that the evidence would support the existence of a detrimental such influence.



## ALABAMA PURPOSE 12

**To promote growth and development of a domestic insurance industry, thereby realizing the general economic and public benefit that derives from the fact that domestic insurance companies typically invest a far higher percentage of their admitted assets in Alabama than do foreign companies. Alabama's efforts to achieve economic parity with other, more economically-advanced states is materially enhanced by differential premium taxation because of the general practice of domestic insurance companies to direct significantly higher percentages of their investment capital to in-state projects. Domestic insurance companies are therefore a very important source of capital for financial projects that benefit the citizens of Alabama and that contribute to a faster rate of economic growth within the state.**

As I have previously discussed (pg. III 17), the key issue in regard to this purpose is whether or not domestic firms invest more heavily in the state of Alabama relative to some appropriate basis than do foreign firms. Dr. Thompson argues that, since domestic firms invest a larger portion of their admitted assets in Alabama than do foreign firms, that the state would somehow be the beneficiary of greater levels of investment if domestic firms were promoted at the expense of foreign firms through discriminatory taxation. Using admitted assets as a basis for comparing levels of investment, however, is quite inappropriate. Consider a case in which a domestic firm is acquired by a much larger out-of-state firm. Suppose that the domestic firm invests 50% of its admitted assets in the state, that the acquiring firm has admitted assets 99 times as large, and that business operations of the two companies remain entirely unchanged. Prior to the acquisition the domestic firm would be deemed an important affirmation of the relative benefits, in terms of in-state investments, of domestic firms over foreign firms based on its 50% of admitted assets invested in the state. After the acquisition, how-

ever, with nothing changed except the name of the domestic operation, it would still be deemed an affirmation of the relative benefits of domestic firms over foreign firms but for the opposite reason as its percent of admitted assets invested in-state, based now on its admitted assets combined with those of its acquirers, would have dropped to .5%. Clearly, such a whimsical measure cannot be used as a credible basis for comparing the investment participation of insurance companies in the state.

A far more meaningful measure is Alabama admitted assets at year end to Alabama annual premiums. Exhibit 2 lists this statistic for seven foreign and seven domestic

EXHIBIT 2

ALABAMA VERSUS OUT-OF-STATE PREMIUM AND ADMITTED ASSETS SHARES FOR SEVEN FOREIGN AND SEVEN DOMESTIC INSURERS IN ALABAMA (1981)

| | Alabama Premiums/ Total Premiums (%) | Alabama Investment/ Total Investments (%) | Alabama Investment/ TP Alabama Premiums (%) |
|---|---|---|---|
| 1) Equitable | 1.0 | .9 | 9.5 |
| 2) Aetna | 1.4 | 1.1 | 6.0 |
| 3) John Hancock | .9 | 1.0 | 14 |
| 4) Metropolitan | .8 | 1.0 | 14.0 |
| 5) New York Life | 1.5 | 1.0 | 7.0 |
| 6) State Farm | 2.7 | 1.1 | 3.4 |
| 7) Independent Life | 11.0 | 3.4 | 1.3 |
| 1) Federated Guaranty | 28.0 | 28.0 | 1.0 |
| 2) Liberty National | 93.6 | 97.0 | 4.1 |
| 3) Mutual Savings Life | 74.4 | 40.8 | 2.9 |
| 4) Protective Life | 28.8 | 16.4 | 1.5 |
| 5) Life of Alabama | 89.0 | 70.6 | 2.5 |
| 6) Southern United | 70.9 | 60.2 | 2.4 |
| 7) National Security | 77.2 | 48.8 | 2.8 |



life insurers for 1981. Foreign firms, on average, are seen to have significantly higher values for this ratio than do domestics. Despite the fact that it an be argued that such domestic ratios may improve as their average longevity approaches that of the older foreign firms, the verdict is, as yet, still out. Thus, there is no basis for presuming that domestic firms have investment policies that are more beneficial to the state than do foreign firms, and, in fact the evidence presented in Exhibit 2 implies that the exact opposite is true. In other words, the state should grant foreign firms *preferential* tax treatment in accomplishing Alabama purpose 12.

ALABAMA PURPOSE 12

**To lessen the adverse impact which foreign insurance companies have on the economy of Alabama. Foreign insurance companies collect far more insurance premiums from Alabama policyholders than they reinvest in Alabama. By channeling the premiums collected in Alabama to investments and purposes outside of Alabama, the activities of foreign companies have an adverse impact on economic growth within the State—much needed funds are being withdrawn from the State's economy at the very time when such funds are desperately needed to help boost economic activity within the State. In contrast, it is well known that domestic insurance companies, on average, reinvest a far higher proportion of their admitted assets in Alabama than do foreign companies. One of the purposes of differential premium taxation in Alabama is thus to help redress the adverse impact which foreign companies have on the State's economy as concerns the use of the premium income they obtain in Alabama and their relative disinclination to invest in Alabama's underdeveloped economy. Achieving a higher degree of economic parity with the rest of the states in the United States has for many years been one of the State's foremost goals.**

As I have previously discussed (pg III-19), discriminatory taxation aimed at minimizing any such outflow of funds (which can be characterized as net premiums less benefits paid, dividends and increases in investments in Alabama) from the state amounts to a direct tax on the "savings" of Alabama citizens. Such a tax can only be shunned by any government concerned with the welfare of its citizens.

Dr. Thompson addresses his arguments in this regard to bank deposits of foreign and domestic insurance firms as of the end of calendar 1981. Clearly, the only relevant measure involving bank deposits would be average deposits as insurance company bank accounts are obviously extremely bloated at year end due to some annual premiums falling due at this time and to "cleaning up the balance sheet." Naturally, such deposits would be in their home states.

In any event, bank deposits are totally irrelevant, whether year-end or average, as through the Fed Funds market such deposits readily flow across state lines to wherever capital is required. Indeed, even if foreign firms did deposit larger amounts in Alabama banks, such deposits would quickly flow to the same places as when such deposits were made out of state. Thus, Dr. Thompson's arguments in this regard are without economic basis.

## ALABAMA PURPOSE 14

**To raise revenues for the State of Alabama.**

In regard to this purpose I agree wholeheartedly with Dr. Thompson's analysis. As I have previously discussed (pg. III-20), Alabama's premium tax structure does raise significant revenues for the State of Alabama. The discriminatory portion (2% excess rate) provided $36.9 million to the state in 1979 alone. However, as Dr. Thompson points out Alabama's revenue gain for premium



taxation could be met by equal taxation just as well as through their existing discriminatory scheme, i.e. discrimination is not essential to raising revenues. Thus, the raising of revenue cannot possibly be a legitimate purpose of such taxation, given the toll it takes on Alabama citizens in the form of higher insurance prices, etc., when a far less noxious means of raising revenues is available to the state, i.e. equal taxation.

## SECTION II:

### Rebuttal of the Analysis of Glenn A. Overstreet, Jr., Ph. D.

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Dr. Overstreet begins his analysis by observing that the 17 legitimate purposes given by the State of Alabama for discriminatory taxation can be distilled down to 3 major state purposes as follows:

1) enhancement of competitive forces in the state's insurance markets.

2) enlargement of the pool of capital or investable funds within the state.

3) expansion of the types and insurance delivery systems available to the consuming public.

He then proceeds to discuss these major purposes in succession but only from a single perspective in each case, e.g. his discussion relative to major purpose 1 is limited to the competitive benefits of reduced barriers to entry which he alleges results from discriminatory taxation.

I have structured my rebuttal in a similar format.

### Reduction of Barriers to Entry as a Means of Enhancing the Insurance Market's Competitive Forces.

In his discussion of this major purpose, Dr. Overstreet notes that the insurance industry exhibits a significant degree of concentration, i.e., a relatively few firms do a large portion of the total business, and that competition and concentration are inversely related. These facts are cited as proof of the need for greater competition in the insurance industry.



He then continues with some 10 pages of discussion in regard to the major barriers to entry in the insurance industry, namely economies of scale and capitalization requirements, and notes that preferential premium tax treatment benefits young domestic companies in overcoming these hurdles.

The discussion concludes with some statistical analysis which apparently shows that foreign firms are not hurt too badly by discriminatory taxation, in that they continue to do business in discriminatory states, and that domestic firms are, indeed, aided by having to pay only a 1% premium tax relative to having to pay a 3% premium tax.

I certainly have no arguments with Dr. Overstreet's major points that:

1) concentration and competition are inversely related

2) the major barriers to entry in the insurance business are economies of scale and capitalization requirements.

3) domestic firms are benefited by paying a 1% premium tax instead of a 3% premium tax.

The first two are simply widely accepted economic facts, and the third is patently obvious. However, it seems evident, in regard to the third point, that foreign firms would receive equal benefit from such preferential tax treatment and, since there are literally hundreds of established foreign firms not operating in Alabama that would find a 1% premium tax attractive, that the state might induce a greater number of participants in the Alabama insurance market by reversing its tax scheme in favor of foreign firms.

In any event, all of Dr. Overstreet's analysis in these regards is fatally flawed in that he assumes that competition is served by simply acting to increase the number of participants in the insurance market, i.e., that

discriminatory taxation results in an increased level of competition in the Alabama insurance market because it *may* induce a greater number of participants.

As I have previously discussed (pgs. 29 thru 34), discriminatory taxation can be proven, based on sound economic principles, to be an anticompetitive measure. It could only result in increased prices, lower quantities and lower levels of customer service than would prevail in its absence. Indeed, attempting to increase competition through discriminatory taxation amounts to improving the competitiveness of a horse race by tying together the legs of the fastest horses.

It is interesting to note that in Alabama, even the pseudo-competitive result of increased numbers of participants predicted by Dr. Overstreet, has not occurred. In fact, the number of insurance companies domiciled in Alabama has dwindled from 60 in 1955 to only 55 in 1980, the period of duration of Alabama's current discriminatory scheme. In summary, it is readily apparent that Dr. Overstreet's analysis is totally irrelevant and his conclusions totally erroneous.

**Investment Behavior of Foreign versus Domestic Insurance Companies.**

Dr. Overstreet's analysis of this major purpose is contained entirely in Dr. Thompson's analysis of Alabama purposes 1, 11 and 13. Accordingly, my rebuttal of Dr. Overstreet's analysis is contained entirely in my rebuttal of Dr. Thompson's analysis of Alabama purposes 1, 11 and 13.

COMPARATIVE POLICY TYPES AND DISTRIBUTION SYSTEMS OF FOREIGN AND DOMESTIC INSURANCE COMPANIES.

Dr. Overstreet begins his analysis of this major purpose by discussing various differences in product mix for foreign firms relative to domestic firms. He notes that the



10 foreign insurers write a mix of 54% life to 46% accident and health compared to a 68/32 breakdown for the 10 largest domestic insurers. His point seems to be that there is some inherent difference between foreign and domestic firms that is responsible for this difference in product mix, and while the collective product mixes for each category seem to bear this out, firm by firm comparisons indicate that there is no such difference in reality. Protective Life, Old Southern and Employers, for example, write a lower proportion of life than do the 10 foreign firms collectively with the latter 2 writing a lower proporiton of life than any of the 10 foreign firms. On the other hand, New York Life writes a lower proportion of accident and health than do the 10 domestic firms collectively as well as a lower such proportion than all but 1 of the domestic firms. Indeed, if Aetna and Travelers are removed from the foreign roster and Federated Guaranty and National Security from the domestic roster, the life versus accident and health collective product mixes for the remaining 8 companies in each category are nearly identical with foreign firms writing a 64/36 mix and domestics writing a 65/35 mix. Clearly, Dr. Overstreet's comments in this regard show the danger of the careless use of statistics and, equally clearly, my comments show that there is no verifiable inherent difference between domestic and foreign firms in this regard.

In similar fashion, Dr. Overstreet uses misleading collective statistics for percent of life written in the form of group insurance (31.9% for foreign versus 9.4% for domestics) and average size of ordinary life policies ($16,224 for foreign versus $10,949 for domestics) in his efforts to manufacture some inherent difference between foreign firms and domestic firms in these regards. State Farm and Independent both write lower percentages of their life business in the form of group insurance than do the 10 domestics collectively, while Protective and Employers both write higher percentages of their

life business in the form of group insurance than do the 10 foreigns collectively. Further, Independent writes a lower average ordinary life policy than the domestic average, while Federated Guaranty writes a higher average ordinary life policy than the foreign average. Once again, there is obviously no inherent difference between foreign and domestic in these regards, or in any other such regard, as implied by Dr. Overstreet.

In any event, even if any of Dr. Overstreet's implications were valid, it is totally inappropriate to evaluate the effects of discriminatory taxation based only on ex-post results after 25 years of such discrimination since 1955. Clearly, any such evaluation must monitor industry changes over the discriminatory period with positive results being recognized if such changes were in the desired directions. Dr. Overstreet's methodology is thus totally inadequate and his conclusions, as a result, have no basis in economic logic or fact. Indeed, based on the fact that foreign firms in the past have done substantial debit insurance business, it is obvious that his conclusion that discriminatory taxation has helped maintain the existence of debit insurance in Alabama is totally false. Such taxation has actually worked to the detriment of debit insurance in Alabama in forcing foreign firms out of this market by reducing its profitability to them below acceptable levels.

The remainder of Dr. Overstreet's analysis of this major purpose is entirely contained in Dr. Thompson's analysis of Alabama purposes 7 and 10. Accordingly, my rebuttal of his analysis is entirely contained in my rebuttal to Dr. Thompson's analysis of Alabama purposes 7 and 10.

# JOINT

# APPENDIX

Supreme Court, U.S.
FILED
JUN 20 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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METROPOLITAN LIFE INSURANCE CO., *et al.*,
*Appellants,*

v.

W. G. WARD, JR., *et al.*,
*Appellees.*

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**On Appeal from the Supreme Court of Alabama**

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**JOINT APPENDIX**
**Volume II**
**(Pp. 353-485)**

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July 1984

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PROBABLE JURISDICTION NOTED APRIL 16, 1984

BEST AVAILABLE COPY

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## THOMPSON EXHIBIT 1

**Number and Percent of Life Insurance Companies Domiciled in States with Differential Premium Tax Provisions, As Compared to U.S. Totals, Selected Years, 1940-1980**

| | 1980 | 1975 | 1970 | 1965 | 1960 | 1955 | 1950* | 1945* | 1940* |
|---|---|---|---|---|---|---|---|---|---|
| United States | 1,931 | 1,797 | 1,819 | 1,624 | 1,439 | 1,060 | 650 | 463 | 444 |
| ALABAMA | 34 | 39 | 54 | 43 | 42 | 36 | 14 | 8 | 5 |
| Alaska | 1 | 1 | 2 | 2 | 2 | — | — | — | — |
| Arizona | 508 | 403 | 346 | 172 | 108 | 25 | 3 | 1 | 0 |
| Arkansas | 23 | 29 | 29 | 30 | 35 | 15 | 8 | 6 | 6 |
| Florida | 38 | 38 | 28 | 30 | 26 | 22 | 17 | 11 | 11 |
| Hawaii | 8 | 9 | 9 | 9 | 5 | — | — | — | — |
| Illinois | 86 | 88 | 96 | 92 | 58 | 35 | 31 | 24 | 19 |
| Indiana | 55 | 58 | 55 | 48 | 54 | 34 | 20 | 11 | 14 |
| Kansas | 20 | 20 | 25 | 20 | 14 | 12 | 11 | 9 | 11 |
| Kentucky | 14 | 14 | 19 | 16 | 11 | 11 | 8 | 8 | 7 |
| Maine | 4 | 4 | 4 | 3 | 2 | 1 | 1 | 1 | 1 |
| Michigan | 24 | 23 | 19 | 20 | 11 | 10 | 5 | 4 | 3 |
| Mississippi | 25 | 16 | 16 | 15 | 19 | 9 | 9 | 8 | 8 |
| Nebraska | 29 | 29 | 33 | 32 | 20 | 20 | 17 | 13 | 15 |
| North Carolina | 21 | 21 | 22 | 25 | 26 | 17 | 13 | 10 | 12 |
| Ohio | 45 | 45 | 39 | 30 | 16 | 13 | 12 | 10 | 12 |

THOMPSON EXHIBIT 1—Continued

| | 1980 | 1975 | 1970 | 1965 | 1960 | 1955 | 1950* | 1945* | 1940* |
|---|---|---|---|---|---|---|---|---|---|
| Oklahoma | 69 | 53 | 56 | 56 | 37 | 16 | 10 | 11 | 10 |
| Oregon | 7 | 7 | 8 | 10 | 5 | 3 | 1 | 1 | 1 |
| South Dakota | 9 | 7 | 8 | 9 | 9 | 7 | 7 | 4 | 4 |
| Tennessee | 24 | 22 | 21 | 24 | 26 | 16 | 11 | 10 | 10 |
| Texas | 205 | 197 | 225 | 248 | 300 | 364 | 118 | 55 | 47 |
| Washington | 19 | 23 | 25 | 18 | 17 | 12 | 11 | 11 | 10 |
| Wisconsin | 28 | 27 | 26 | 23 | 15 | 9 | 8 | 9 | 8 |
| Wyoming | 2 | 3 | 4 | 7 | 3 | 1 | 0 | 0 | 0 |
| Total in States with Differential Premium Taxes | | | | | | | | | |
| Number | 1,298 | 1,176 | 1,169 | 982 | 861 | 688 | 335 | 225 | 214 |
| Percent | 67.2% | 65.4% | 64.3% | 60.5% | 59.8% | 64.9% | 51.5% | 48.6% | 48.2% |

* At year-end, rather than mid-year.

Source: *Life Insurance Fact Book*, for 1980 data, see 1981 Edition, p. 90; for 1975 data, see 1976 Edition, p. 87; for 1970 data, see 1971 Edition, p. 89; for 1965 data, see 1966 Edition, p. 97; for 1960 data, see 1961 Edition, p. 98; for 1955 data, see 1956 Edition, p. 48; for 1950 data, see 1961 Edition, p. 98; for 1945 data, see 1946 Edition, p. 53; for 1940 data, see 1956 Edition, p. 48.



## THOMPSON EXHIBIT 2

Number and Percent of Property-Liability Insurance Companies Domiciled in States with Differential Premium Tax Provisions, As Compared to U.S. Totals, Selected Years, 1965-1981

| | 1981 | 1980 | 1979 | 1978 | 1977 | 1976 | 1975 | 1970 | 1965 | 1960 |
|---|---|---|---|---|---|---|---|---|---|---|
| United States | 2,953 | 2,867 | 2,938 | 2,940 | 2,880 | 2,886 | 2,934 | 2,831 | 3,161 | |
| ALABAMA | 21 | 21 | 21 | 21 | 22 | 23 | 22 | 22 | 22 | 18 |
| Alaska | 9 | 8 | 5 | 4 | 4 | 4 | 4 | 1 | — | |
| Arizona | 16 | 17 | 17 | 18 | 19 | 18 | 14 | 8 | 1 | |
| Arkansas | 28 | 31 | 33 | 23 | 13 | 13 | 14 | 30 | 21 | |
| Florida | 44 | 37 | 28 | 29 | 31 | 25 | 26 | 26 | 24 | |
| Hawaii | 11 | 11 | 10 | 9 | 9 | 9 | 9 | 7 | 8 | |
| Illinois | 286 | 290 | 290 | 296 | 309 | 291 | 298 | 289 | 323 | |
| Indiana | 103 | 103 | 49 | 52 | 52 | 115 | 115 | 100 | 115 | |
| Kansas | 34 | 35 | 34 | 34 | 34 | 34 | 35 | 35 | 38 | |
| Kentucky | 34 | 34 | 36 | 35 | 36 | 36 | 36 | 34 | 32 | |
| Maine | 23 | 23 | 23 | 28 | 30 | 30 | 30 | 41 | 40 | |
| Michigan | 49 | 49 | 55 | 57 | 81 | 56 | 56 | 55 | 72 | |
| Mississippi | 6 | 5 | 7 | 7 | 7 | 7 | 5 | 4 | 5 | |
| Nebraska | 35 | 38 | 77 | 75 | 74 | 74 | 74 | 73 | 85 | |
| North Carolina | 55 | 54 | 54 | 54 | 58 | 50 | 52 | 50 | 50 | |
| Ohio | 151 | 147 | 141 | 142 | 142 | 143 | 145 | 145 | 154 | |

THOMPSON EXHIBIT 2—Continued

| | 1981 | 1980 | 1979 | 1978 | 1977 | 1976 | 1975 | 1970 | 1965 | 1960 |
|---|---|---|---|---|---|---|---|---|---|---|
| Oklahoma | 56 | 56 | 40 | 34 | 28 | 31 | 30 | 39 | 30 | |
| Oregon | 12 | 12 | 11 | 10 | 10 | 10 | 10 | 8 | 8 | |
| South Dakota | 57 | 57 | 57 | 59 | 59 | 59 | 59 | 55 | 56 | |
| Tennessee | 48 | 41 | 44 | 44 | 43 | 40 | 41 | 14 | 41 | |
| Texas | 209 | 183 | 184 | 180 | 179 | 178 | 189 | 137 | 128 | |
| Washington | 23 | 21 | 21 | 19 | 19 | 20 | 20 | 17 | 17 | |
| Wisconsin | 201 | 209 | 209 | 209 | 217 | 202 | 203 | 218 | 248 | |
| Wyoming | 3 | 3 | 4 | 5 | 3 | 3 | 3 | 3 | 12 | |
| Total in 24 States with Differential Premium Tax Provisions | | | | | | | | | | |
| Number | 1,514 | 1,485 | 1,450 | 1,444 | 1,478 | 1,471 | 1,490 | 1,411 | 1,501 | |
| Percent | 51.6% | 51.8% | 49.4% | 49.1% | 51.3% | 51.0% | 50.8% | 49.8% | 47.5% | |

Source: for 1981, *Insurance Facts*, 1981-82 Edition, p. 8; for 1980, *Insurance Facts*, 1980-81 Edition, p. 8, for 1979, *Insurance Facts*, 1979 Edition, p. 6; for 1978 *Insurance Facts*, 1978 Edition, p. 8; for 1977, *Insurance Facts*, 1977 Edition, p. 9; for 1976, *Insurance Facts*, 1976 Edition, p. 9; for 1975, *Insurance Facts*, 1975 Edition, p. 8; for 1970 *Insurance Facts*, 1970 Edition, p. 8; for 1965, *Insurance Facts*, 1965 Edition, p. 10; for 1960 for Alabama, Alabama State Department of Insurance, *1960 Alabama Insurance Report.*



## THOMPSON EXHIBIT 3

Insurance Premiums Written in Alabama, Domestic versus Foreign Companies, Selected Years, 1955-1980

| | Property and Casualty Segment | | | | | Life and Accident and Health Segment | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Year | Total Premiums Written | Domestic Companies | % of Total | Foreign Companies | % of Total | Total Premiums Written | Domestic Companies | % of Total | Foreign Companies | % of Total |
| 1955 | $ 97,435,215 | $ 13,368,860 | 13.7% | $ 84,066,355 | 86.3% | $ 183,184,936 | $ 78,682,599 | 43.0% | $104,502,337 | 57.0% |
| 1960 | 145,333,762 | 17,134,408 | 11.8 | 128,199,354 | 88.2 | 274,525,552 | 120,960,394 | 44.1 | 153,565,158 | 55.9 |
| 1965 | 210,262,157 | 22,292,467 | 10.6 | 187,969,690 | 89.4 | 340,999,957 | 162,763,215 | 47.7 | 178,236,742 | 52.3 |
| 1970 | 349,199,030 | 37,067,423 | 10.6 | 312,131,607 | 89.4 | 614,926,147 | 260,603,930 | 42.4 | 354,322,227 | 57.6 |
| 1975 | 601,182,926 | 72,289,476 | 12.0 | 528,893,450 | 88.0 | 1,044,828,890 | 412,303,476 | 39.5 | 632,525,414 | 60.5 |
| 1980 | 1,170,428,000 | 154,738,000 | 13.2 | 1,015,690,000 | 86.8 | 1,616,000,000 | 707,461,000 | 43.8 | 908,539,000 | 56.2 |

Source: Alabama Department of Insurance Records.

## THOMPSON EXHIBIT 4

**Average Amount of Life Insurance in Force Per Family in States with Differential Premium Tax Provisions and in the United States, Selected Years, 1955-1980**

| | Average Amount of Life Insurance in Force Per Family | | | | | As a % of U.S. Average | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1980 | 1975 | 1970 | 1965 | 1955 | 1980 | 1975 | 1970 | 1965 | 1955 |
| ALABAMA | $39,500 | $27,600 | $20,500 | $13,700 | $5,600 | 95.2% | 98.2% | 98.1% | 93.2% | 81.2% |
| Alaska | 50,100 | 28,500 | 18,200 | 11,700 | — | 120.7 | 101.4 | 87.1 | 79.6 | — |
| Arizona | 38,200 | 29,100 | 19,600 | 12,600 | 4,700 | 92.0 | 103.6 | 93.8 | 85.7 | 68.1 |
| Arkansas | 28,300 | 18,000 | 13,100 | 8,400 | 3,400 | 68.2 | 64.1 | 62.7 | 57.1 | 49.2 |
| Florida | 32,100 | 22,600 | 17,200 | 11,900 | 5,300 | 77.3 | 80.4 | 82.3 | 81.0 | 76.8 |
| Hawaii | 53,100 | 41,500 | 34,000 | 22,500 | — | 218.0 | 147.7 | 162.7 | 153.1 | — |
| Illinois | 48,500 | 33,000 | 23,200 | 16,800 | 8,200 | 116.9 | 117.4 | 111.0 | 114.3 | 118.8 |
| Indiana | 43,800 | 29,200 | 21,600 | 15,800 | 7,500 | 105.5 | 103.9 | 103.3 | 107.5 | 108.7 |
| Kansas | 42,600 | 28,100 | 19,400 | 13,300 | 6,000 | 102.7 | 100.0 | 92.8 | 90.5 | 87.0 |
| Kentucky | 33,000 | 22,500 | 16,900 | 11,000 | 4,900 | 79.5 | 80.1 | 80.9 | 74.8 | 71.0 |
| Maine | 32,400 | 23,200 | 17,200 | 12,100 | 5,600 | 78.1 | 82.6 | 82.3 | 82.3 | 81.2 |
| Michigan | 49,400 | 32,700 | 23,300 | 17,300 | 7,600 | 119.0 | 116.4 | 111.5 | 117.7 | 110.1 |
| Mississippi | 31,800 | 20,100 | 14,600 | 8,900 | 3,200 | 76.6 | 71.5 | 69.9 | 60.5 | 46.4 |
| Nebraska | 45,100 | 29,700 | 20,300 | 13,600 | 5,900 | 109.6 | 105.7 | 97.1 | 92.5 | 85.5 |
| North Carolina | 38,500 | 25,300 | 19,200 | 12,800 | 5,500 | 92.8 | 90.0 | 91.9 | 87.1 | 79.7 |
| Ohio | 45,800 | 30,500 | 22,400 | 15,900 | 8,100 | 110.4 | 108.5 | 107.2 | 108.2 | 117.4 |
| Oklahoma | 36,100 | 24,300 | 18,400 | 12,300 | 5,400 | 87.0 | 86.5 | 88.0 | 83.7 | 78.2 |
| Oregon | 36,700 | 23,100 | 17,300 | 12,800 | 5,000 | 88.4 | 82.2 | 82.8 | 87.1 | 72.5 |
| South Dakota | 39,100 | 24,600 | 16,900 | 11,300 | 4,200 | 94.2 | 87.5 | 80.9 | 76.9 | 60.9 |
| Tennessee | 39,500 | 26,800 | 19,400 | 12,800 | 5,700 | 95.2 | 95.4 | 92.8 | 87.1 | 82.6 |
| Texas | 43,200 | 28,200 | 20,400 | 13,800 | 6,100 | 104.1 | 100.4 | 97.6 | 93.9 | 88.4 |
| Washington | 36,300 | 24,900 | 18,400 | 13,000 | 5,400 | 87.5 | 88.6 | 88.0 | 88.4 | 78.3 |
| Wisconsin | 43,000 | 27,500 | 19,500 | 14,200 | 6,600 | 103.6 | 97.9 | 93.3 | 96.6 | 95.7 |
| Wyoming | 39,900 | 25,500 | 18,800 | 13,600 | 5,100 | 96.1 | 90.7 | 90.0 | 92.5 | 73.9 |
| U.S. Average | 41,500 | 28,100 | 20,900 | 14,700 | 6,900 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| Number of 24 States above the U.S. Average | 10 | 9 | 5 | 5 | 4 | | | | | |

Source: *Life Insurance Fact Book*. For 1980 data, see 1981 Edition, p. 25; for 1975 data, see 1976 Edition, p. 18; for 1970 data, see 1971 Edition, p. 23; for 1955 and 1965 data, see 1966 Edition, p. 21.

## THOMPSON EXHIBIT 5

Life Insurance in Force Per Capita in States Having Differential Premium Tax Provisions, With Comparisons to Other States and to the U.S., Selected Years, 1950-1980

| | 1980 | 1975 | 1970 | 1965 | 1960 | 1955 | 1950 |
|---|---|---|---|---|---|---|---|
| ALABAMA | $14,230 | $ 9,294 | $ 6,208 | $4,028 | $2,514 | $1,605 | $ 932 |
| Alaska | 18,460 | 8,932 | 5,316 | 3,096 | 1,821 | — | — |
| Arizona | 14,091 | 9,895 | 6,155 | 3,890 | 2,542 | 1,903 | 881 |
| Arkansas | 10,615 | 6,313 | 4,190 | 2,676 | 1,728 | 1,053 | 578 |
| Florida | 12,967 | 8,565 | 6,056 | 3,954 | 2,770 | 1,798 | 1,196 |
| Hawaii | 19,413 | 13,421 | 10,048 | 6,454 | 4,165 | — | — |
| Illinois | 18,145 | 11,628 | 7,904 | 5,464 | 3,918 | 2,779 | 2,016 |
| Indiana | 15,902 | 10,067 | 7,032 | 4,897 | 3,379 | 2,411 | 1,639 |
| Kansas | 16,417 | 10,199 | 6,506 | 4,321 | 2,803 | 1,988 | 1,311 |
| Kentucky | 12,092 | 7,645 | 5,258 | 3,327 | 2,141 | 1,483 | 937 |
| Maine | 12,055 | 8,092 | 5,634 | 3,796 | 2,501 | 1,716 | 1,216 |
| Michigan | 17,589 | 11,203 | 7,590 | 5,200 | 3,337 | 2,467 | 1,716 |
| Mississippi | 11,001 | 6,457 | 4,299 | 2,589 | 1,547 | 929 | 516 |
| Nebraska | 17,187 | 10,714 | 6,784 | 4,367 | 2,847 | 1,990 | 1,318 |
| North Carolina | 14,083 | 8,502 | 5,745 | 3,724 | 2,373 | 1,594 | 1,011 |
| Ohio | 15,090 | 10,639 | 7,348 | 4,772 | 3,590 | 2,633 | 1,922 |
| Oklahoma | 14,123 | 8,817 | 6,247 | 4,087 | 2,647 | 1,731 | 1,047 |
| Oregon | 14,475 | 8,569 | 5,930 | 4,145 | 2,790 | 1,772 | 1,178 |
| South Dakota | 14,088 | 8,436 | 5,423 | 3,523 | 2,149 | 1,330 | 882 |
| Tennessee | 14,507 | 9,231 | 6,116 | 3,925 | 2,568 | 1,705 | 1,017 |
| Texas | 15,856 | 9,549 | 6,475 | 4,282 | 2,938 | 1,989 | 1,203 |
| Washington | 14,229 | 9,055 | 6,233 | 4,263 | 2,797 | 1,953 | 1,225 |
| Wisconsin | 15,425 | 9,552 | 6,503 | 4,318 | 3,051 | 2,104 | 1,484 |
| Wyoming | 14,753 | 8,776 | 6,129 | 4,391 | 2,674 | 1,769 | 1,100 |
| Average in 24 States with Differential Tax Provisions | 15,316 | 9,692 | 6,596 | 4,428 | 3,001 | 2,080 | 1,282 |
| Average in All Other States | 15,838 | 10,145 | 7,133 | 4,852 | 3,485 | 2,428 | 1,692 |
| U.S. Average | 15,588 | 9,930 | 6,883 | 4,655 | 3,259 | 2,266 | 1,548 |

Note: These figures were calculated by dividing the total amount of life insurance in force by population.

Sources: The values for total life insurance in force were obtained from various editions of the *Life Insurance Fact Book* (see Thompson Exhibit 9); population data was obtained from periodic reports issued by the U.S. Bureau of the Census and the Bureau of Economic Analysis and on file in the Center for Business and Economic Research, The University of Alabama.



## THOMPSON EXHIBIT 6

Ratio of Total Life Insurance Premium Receipts to Total Personal Disposable Income in States Having Differential Premium Tax Provisions, with Comparisons to Other States and to the U.S., 1973-1980

| | 1980 | 1979 | 1978 | 1977 | 1976 | 1975 | 1974 | 1973 |
|---|---|---|---|---|---|---|---|---|
| ALABAMA | 2.64% | 2.84% | 2.95% | 3.05% | 3.09% | 3.17% | 3.38% | 3.44% |
| Alaska | 1.40 | 1.46 | 1.47 | 1.55 | 1.59 | 1.27 | 1.54 | 1.63 |
| Arizona | 2.02 | 2.13 | 2.22 | 2.61 | 2.78 | 2.88 | 2.67 | 2.33 |
| Arkansas | 1.82 | 1.83 | 1.95 | 2.04 | 2.12 | 2.04 | 2.08 | 2.25 |
| Florida | 2.05 | 2.19 | 2.27 | 2.38 | 2.46 | 2.50 | 2.58 | 2.71 |
| Hawaii | 2.57 | 2.48 | 2.49 | 2.60 | 2.61 | 2.71 | 2.84 | 2.75 |
| Illinois | 2.18 | 2.30 | 2.39 | 2.46 | 2.55 | 2.55 | 2.63 | 2.67 |
| Indiana | 2.31 | 2.34 | 2.44 | 2.56 | 2.65 | 2.73 | 2.77 | 2.83 |
| Kansas | 2.14 | 2.18 | 2.33 | 2.47 | 2.51 | 2.51 | 2.61 | 2.54 |
| Kentucky | 1.99 | 2.09 | 2.16 | 2.29 | 2.32 | 2.35 | 2.49 | 2.69 |
| Maine | 1.98 | 2.11 | 2.19 | 2.36 | 2.33 | 2.47 | 2.53 | 2.63 |
| Michigan | 1.90 | 1.92 | 1.99 | 2.10 | 2.16 | 2.21 | 2.35 | 2.38 |
| Mississippi | 2.22 | 2.31 | 2.35 | 2.32 | 2.41 | 2.41 | 2.42 | 2.46 |
| Nebraska | 2.74 | 2.77 | 2.80 | 2.89 | 2.93 | 2.89 | 2.93 | 2.71 |
| North Carolina | 2.45 | 2.58 | 2.58 | 2.66 | 2.69 | 2.76 | 2.87 | 2.92 |
| Ohio | 2.34 | 2.34 | 2.46 | 2.59 | 2.65 | 2.73 | 2.79 | 2.88 |
| Oklahoma | 1.95 | 2.05 | 2.13 | 2.25 | 2.37 | 2.47 | 2.59 | 2.60 |

THOMPSON EXHIBIT 6—Continued

| | 1980 | 1979 | 1978 | 1977 | 1976 | 1975 | 1974 | 1973 |
|---|---|---|---|---|---|---|---|---|
| Oregon | 1.73 | 1.81 | 1.86 | 1.97 | 2.03 | 2.10 | 2.19 | 2.39 |
| South Dakota | 2.48 | 2.53 | 2.54 | 2.66 | 2.79 | 2.52 | 2.44 | 2.21 |
| Tennessee | 2.33 | 2.55 | 2.66 | 2.78 | 2.84 | 2.86 | 2.96 | 3.13 |
| Texas | 1.99 | 2.11 | 2.23 | 2.31 | 2.39 | 2.43 | 2.59 | 2.71 |
| Washington | 1.51 | 1.65 | 1.72 | 1.80 | 1.82 | 1.89 | 1.97 | 2.11 |
| Wisconsin | 2.00 | 2.11 | 2.23 | 2.33 | 2.43 | 2.46 | 2.54 | 2.71 |
| Wyoming | 1.73 | 1.83 | 2.00 | 2.09 | 2.20 | 2.19 | 2.31 | 2.38 |
| Average in 24 States with Differential Tax Provisions | 2.09 | 2.20 | 2.30 | 2.40 | 2.47 | 2.51 | 2.61 | 2.69 |
| Average in All Other States | 2.05 | 2.16 | 2.26 | 2.36 | 2.42 | 2.45 | 2.55 | 2.64 |
| U.S. Average | 2.07 | 2.18 | 2.28 | 2.37 | 2.44 | 2.48 | 2.58 | 2.66 |

Note: The percentage ratio was calculated by dividing the life insurance premium receipts of life insurance companies by total personal disposable income.

Sources: The data for life insurance premium receipts was obtained from the *Life Insurance Fact Book*; for 1980, 1979, and 1978 premium receipts, see the 1981 Edition, p. 60; for 1977, 1976, and 1975 premium receipts, see the 1979 Edition, p. 60; for 1974 and 1973 premium receipts, see the 1977 Edition, p. 57. Data for total personal disposable income was obtained from the U.S. Department of Commerce publication, *Survey of Current Business*, April 1981, p. 40 (for years 1976, 1977, 1978, 1979, and 1980) and from the April 1977 issue, p. 22 (for the years 1973, 1974, and 1975).



## THOMPSON EXHIBIT 7

Alabama and U.S. Comparisons of Premiums for Property and Casualty Insurance and Total Personal Disposable Income, 1970 and 1980

| | 1970 | | 1980 | | Average annual compound growth rate, 1970-1980 | |
|---|---|---|---|---|---|---|
| | Alabama | United States | Alabama | United States | Alabama | United States |
| Direct premiums written for automobile liability, automobile damage and homeowners insurance policies [a] | $ 209,238,000 | $ 17,309,643,000 | $ 654,126,000 | $ 49,427,929,000 | 12.07% | 11.06% |
| Total Personal Disposable Income [b] | $8,977,000,000 | $692,239,000,000 | $24,572,000,000 | $1,795,810,000,000 | 10.69% | 10.00% |
| Direct Premiums Written as a % of Total Personal Disposable Income | 2.36% | 2.50% | 2.66% | 2.75% | | |

[a] As reported in *Insurance Facts*, 1971 Edition, pp. 25-26 and 1981-82 Edition, pp. 29-30.

[b] As reported by U.S. Department of Commerce, *Survey of Current Business*, April 1975 and April 1981.

## THOMPSON EXHIBIT 8

**Total Amount of Life Insurance* in Force in States Having Differential Premium Tax Provisions, and as a Percentage of the U.S. Totals, Selected Years, 1945-1980**
**(in millions of dollars)**

| | 1980 | 1975 | 1970 | 1965 | 1960 | 1955 | 1950 | 1945 |
|---|---|---|---|---|---|---|---|---|
| United States | $3,541,036 | $2,139,171 | $1,492,758 | $906,554 | $586,443 | $372,332 | $254,047 | $151,973 |
| ALABAMA | 55,483 | 34,212 | 21,419 | 13,567 | 8,231 | 4,595 | 2,851 | 1,687 |
| Alaska | 7,421 | 3,305 | 1,616 | 839 | 417 | — | — | — |
| Arizona | 38,384 | 22,621 | 11,048 | 6,162 | 3,358 | 1,494 | 666 | 338 |
| Arkansas | 24,319 | 13,624 | 8,087 | 5,068 | 3,057 | 1,816 | 1,103 | 697 |
| Florida | 127,820 | 73,166 | 41,453 | 23,543 | 13,859 | 6,737 | 3,342 | 1,818 |
| Hawaii | 18,792 | 11,743 | 7,682 | 4,305 | 2,599 | — | — | — |
| Illinois | 207,706 | 131,468 | 87,933 | 58,423 | 39,121 | 26,218 | 17,623 | 11,894 |
| Indiana | 87,510 | 53,869 | 36,593 | 24,104 | 15,792 | 10,518 | 6,502 | 4,041 |
| Kansas | 38,891 | 23,244 | 14,636 | 9,532 | 6,118 | 4,161 | 2,512 | 1,498 |
| Kentucky | 44,378 | 26,522 | 16,997 | 10,448 | 6,510 | 4,316 | 2,751 | 1,772 |
| Maine | 13,598 | 8,683 | 5,817 | 3,785 | 2,438 | 1,603 | 1,115 | 760 |
| Michigan | 163,320 | 102,036 | 65,753 | 43,417 | 26,141 | 17,975 | 10,592 | 6,624 |
| Mississippi | 27,800 | 15,496 | 9,549 | 5,815 | 3,376 | 1,913 | 1,122 | 695 |
| Nebraska | 27,053 | 16,511 | 10,094 | 6,424 | 4,034 | 2,720 | 1,749 | 1,176 |
| North Carolina | 82,922 | 47,500 | 29,295 | 18,110 | 10,854 | 6,780 | 4,112 | 2,413 |
| Ohio | 180,332 | 114,578 | 78,291 | 51,029 | 34,948 | 23,742 | 15,335 | 10,117 |
| Oklahoma | 42,835 | 24,442 | 16,050 | 9,972 | 6,184 | 3,894 | 2,333 | 1,476 |
| Oregon | 38,200 | 19,922 | 12,452 | 8,028 | 4,943 | 2,939 | 1,804 | 1,035 |
| South Dakota | 9,762 | 5,745 | 3,617 | 2,436 | 1,468 | 882 | 578 | 322 |
| Tennessee | 66,762 | 39,334 | 24,977 | 14,909 | 9,179 | 5,821 | 3,571 | 2,009 |
| Texas | 226,168 | 130,018 | 72,757 | 44,449 | 28,271 | 17,225 | 9,351 | 5,247 |
| Washington | 58,909 | 32,769 | 21,298 | 12,647 | 7,965 | 5,066 | 2,923 | 1,795 |
| Wisconsin | 72,719 | 43,651 | 27,899 | 18,272 | 12,088 | 7,749 | 5,102 | 3,427 |
| Wyoming | 6,978 | 3,335 | 2,047 | 1,458 | 885 | 543 | 319 | 169 |
| Total in 24 States with Differential Tax Provisions | | | | | | | | |
| Amount | 1,668,080 | 997,793 | 626,759 | 397,275 | 252,291 | 158,999 | 97,076 | 61,050 |
| Percent | 47.1% | 46.2% | 44.6% | 44.1% | 43.0% | 42.7% | 41.7% | 40.2% |

* Includes ordinary life, group life, industrial life, and credit life policies.

Source: *Life Insurance Fact Book*. For 1980 data, see 1981 Edition, p. 39; for 1975 data, see 1976 Edition, p. 19; for 1970 data, see 1971 Edition, p. 22; for 1965 data, see 1966 Edition, p. 17; for 1960 data, see 1961 Edition, p. 10; for 1955 data, see 1956 Edition, p. 10; for 1950 data, see 1951 Edition, p. 10; for 1945 data, see 1947 Edition, p. 15.

## THOMPSON EXHIBIT 9

Per Capita Life Insurance in Force as a Percentage of Per Capita Disposable Personal Income in States Having Differential Premium Tax Provisions, With Comparisons to Other States and to the U.S., Selected Years, 1950-1980

| | 1980 | 1975 | 1970 | 1965 | 1960 | 1955 | 1950 |
|---|---|---|---|---|---|---|---|
| ALABAMA | 224.1% | 220.4% | 245.9% | 234.7% | 198.3% | 142.4% | 113.4% |
| Alaska | 178.8 | 113.6 | 136.7 | 112.5 | 74.1 | — | — |
| Arizona | 190.3 | 207.3 | 199.6 | 183.1 | 142.0 | 126.3 | 72.2 |
| Arkansas | 171.7 | 154.5 | 170.4 | 160.1 | 138.5 | 99.6 | 74.2 |
| Florida | 169.4 | 173.0 | 149.8 | 163.1 | 160.4 | 124.1 | 102.0 |
| Hawaii | 237.3 | 231.5 | 263.1 | 234.6 | 210.1 | — | — |
| Illinois | 203.6 | 220.7 | 210.2 | 198.2 | 170.0 | 140.0 | 122.4 |
| Indiana | 210.0 | 207.7 | 221.5 | 194.3 | 175.2 | 142.6 | 117.9 |
| Kansas | 195.7 | 197.3 | 201.8 | 190.0 | 166.6 | 127.8 | 96.9 |
| Kentucky | 194.4 | 190.0 | 199.0 | 191.1 | 152.7 | 123.9 | 105.1 |
| Maine | 179.0 | 191.2 | 196.6 | 183.0 | 151.9 | 120.6 | 109.9 |
| Michigan | 215.4 | 216.4 | 215.6 | 194.5 | 164.1 | 139.4 | 111.6 |
| Mississippi | 197.5 | 190.5 | 191.6 | 176.6 | 161.9 | 97.2 | 72.1 |
| Nebraska | 229.8 | 208.6 | 214.1 | 193.9 | 151.7 | 127.5 | 95.6 |
| North Carolina | 211.0 | 197.1 | 207.3 | 204.8 | 170.1 | 132.6 | 104.3 |
| Ohio | 190.8 | 212.9 | 214.1 | 189.9 | 176.0 | 143.6 | 120.2 |
| Oklahoma | 182.0 | 193.6 | 214.7 | 199.4 | 169.1 | 127.6 | 99.9 |
| Oregon | 185.5 | 174.1 | 196.3 | 172.2 | 144.9 | 106.3 | 86.8 |
| South Dakota | 214.6 | 197.3 | 193.7 | 172.7 | 132.0 | 111.7 | 75.3 |
| Tennessee | 216.3 | 217.1 | 202.0 | 214.6 | 166.0 | 145.7 | 110.1 |
| Texas | 194.8 | 193.6 | 212.4 | 204.2 | 172.6 | 133.5 | 99.4 |
| Washington | 161.0 | 164.5 | 179.7 | 165.0 | 135.3 | 107.5 | 80.1 |
| Wisconsin | 200.9 | 199.4 | 201.4 | 182.3 | 162.6 | 131.8 | 110.7 |
| Wyoming | 164.3 | 169.1 | 197.1 | 193.1 | 154.9 | 107.0 | 72.8 |
| Average in 24 States with Differential Premium Taxes | 199.7 | 199.0 | 204.4 | 192.2 | 163.3 | 131.8 | 108.5 |
| Average in All Other States | 195.0 | 194.8 | 201.2 | 190.7 | 173.0 | 139.3 | 117.9 |
| U.S. Average | 195.9 | 196.7 | 202.6 | 191.7 | 168.5 | 136.4 | 113.6 |

Source: Data for life insurance in force was taken from various editions of the *Life Insurance Fact Book*, as shown in reports issued by the U.S. Bureau of the Census and the Bureau of Economic Analysis and on file in the Center for Business and Economic Research, The University of Alabama; per capita disposable personal income data was taken from the *Survey of Current Business*, April 1969, pp. 29-29, August 1975, pp. 10-11, April 1977, p. 22, and April 1981, p. 40 and August 1980 estimates of the Bureau of Economic Analysis (on file in the Center for Business and Economic Research, The University of Alabama).



## THOMPSON EXHIBIT 10

Direct Premiums Written by Property and Liability Insurance Companies in States Having Differential Tax Provisions, with Comparisons to Other States and to the U.S., Selected Years, 1966-1980
(in millions of dollars)

| | 1980 | 1979 | 1978 | 1977 | 1976 | 1975 | 1974 | 1970 | 1966 |
|---|---|---|---|---|---|---|---|---|---|
| ALABAMA | $ 1,194.7 | $ 1,134.1 | $ 1,030.2 | $ 900.6 | $ 741.8 | $ 592.0 | $ 534.5 | $ 305.4 | $ 212.8 |
| Alaska | 252.7 | 264.3 | 288.3 | 274.9 | 210.0 | 143.6 | 96.4 | 51.8 | 34.5 |
| Arizona | 1,122.7 | 1,015.3 | 862.3 | 725.3 | 592.5 | 488.9 | 453.7 | 211.0 | 139.9 |
| Arkansas | 788.3 | 719.0 | 665.6 | 586.3 | 479.1 | 398.2 | 372.8 | 216.9 | 152.8 |
| Florida | 3,912.7 | 3,651.9 | 3,410.4 | 3,024.4 | 2,560.9 | 2,102.4 | 1,873.1 | 924.0 | 556.8 |
| Hawaii | 412.2 | 369.1 | 328.6 | 280.2 | 230.4 | 209.3 | 170.7 | 100.6 | 53.5 |
| Illinois | 5,675.2 | 5,285.8 | 4,838.8 | 4,464.3 | 3,589.6 | 2,833.9 | 2,479.6 | 1,696.4 | 1,197.5 |
| Indiana | 1,957.7 | 1,917.6 | 1,775.0 | 1,582.9 | 1,308.3 | 1,090.8 | 994.3 | 657.6 | 472.1 |
| Kansas | 1,044.4 | 948.6 | 867.3 | 775.8 | 637.4 | 539.5 | 484.0 | 287.9 | 204.8 |
| Kentucky | 1,318.2 | 1,337.2 | 1,117.1 | 981.7 | 852.7 | 674.8 | 609.6 | 331.9 | 228.4 |
| Maine | 441.7 | 406.6 | 356.3 | 305.2 | 257.0 | 222.5 | 201.6 | 114.6 | 84.2 |
| Michigan | 4,279.3 | 4,243.2 | 3,834.2 | 3,235.1 | 2,519.0 | 2,151.6 | 2,049.2 | 1,267.6 | 905.6 |
| Mississippi | 787.2 | 734.2 | 658.9 | 576.7 | 478.6 | 402.4 | 387.2 | 221.1 | 160.0 |
| Nebraska | 682.6 | 632.6 | 571.1 | 512.0 | 446.3 | 372.1 | 335.7 | 198.4 | 139.4 |
| North Carolina | 1,667.9 | 1,535.8 | 1,342.1 | 1,161.9 | 1,010.9 | 897.1 | 867.5 | 536.6 | 353.7 |
| Ohio | 3,811.9 | 3,678.1 | 3,501.1 | 3,209.2 | 2,652.6 | 2,141.2 | 1,897.9 | 1,189.1 | 776.2 |
| Oklahoma | 1,234.6 | 1,101.8 | 972.9 | 818.1 | 668.7 | 549.2 | 506.5 | 321.9 | 234.1 |

## THOMPSON EXHIBIT 10—Continued

| | 1980 | 1979 | 1978 | 1977 | 1976 | 1975 | 1974 | 1970 | 1966 |
|---|---|---|---|---|---|---|---|---|---|
| Oregon | 1,210.1 | 1,162.4 | 1,047.6 | 910.3 | 730.9 | 564.8 | 494.5 | 296.0 | 220.2 |
| South Dakota | 249.2 | 242.0 | 216.0 | 187.5 | 160.8 | 139.8 | 126.0 | 72.9 | 54.5 |
| Tennessee | 1,533.6 | 1,485.8 | 1,366.2 | 1,164.7 | 968.4 | 806.0 | 753.7 | 452.5 | 320.6 |
| Texas | 6,501.4 | 5,866.5 | 5,182.7 | 4,361.9 | 3,640.7 | 2,985.2 | 2,512.9 | 1,522,6 | 1,024.7 |
| Washington | 1,517.4 | 1,398.3 | 1,249.0 | 1,088.4 | 881.0 | 673.3 | 608.6 | 427.2 | 289.4 |
| Wisconsin | 1,719.6 | 1,626.0 | 1,517.1 | 1,336.9 | 1,092.3 | 920.0 | 846.0 | 526.5 | 393.8 |
| Wyoming | 197.9 | 173.4 | 149.6 | 125.1 | 96.4 | 78.0 | 67.5 | 36.2 | 27.7 |
| Total in 24 States with Differential Tax Provisions | | | | | | | | | |
| Amount | 43,313.0 | 40,929.6 | 37,208.4 | 32,589.4 | 26,806.3 | 21,976.6 | 19,723.5 | 11,956.7 | 8,237.1 |
| % of U.S. | 44.8 | 45.4 | 45.7 | 45.5 | 45.3 | 45.5 | 45.4 | 43.6 | 42.4 |
| All Other States | | | | | | | | | |
| Amount | 53,396.9 | 49,164.9 | 44,276.0 | 39,073.9 | 32,330.3 | 26,328.9 | 23,758.0 | 15,475.2 | 11,174.9 |
| % of U.S. | 55.2 | 54.6 | 54.3 | 54.5 | 54.7 | 54.5 | 54.6 | 56.4 | 57.6 |
| United States | | | | | | | | | |
| Amount | 96,709.9 | 90,094.5 | 81,484.4 | 71,663.3 | 59,136.6 | 48,305.5 | 43,481.5 | 27,431.9 | 19,412.0 |
| % of Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

Source: *Insurance Facts.* For 1980, see 1981-1982 Edition, pp. 29-30; for 1979, see 1980-1981 Edition, pp. 27-28; for 1978, see 1979 Edition, pp. 18-19; for 1977, see 1978 Edition, pp. 20-21; for 1976, see 1977 Edition, pp. 21-22; for 1975, see 1976 Edition, pp. 21-22; for 1974, see 1975 Edition, pp. 21-22; for 1970, see 1971 Edition, pp. 25-26; for 1966, see 1967 Edition, pp. 35-36.



## THOMPSON EXHIBIT 11

Comparison of Numbers of Licensed Agents of Largest Foreign and Domestic Insurers in Alabama, by County, January 1, 1982

| | Number of Licensed Agents, January 1, 1982 | | | |
|---|---|---|---|---|
| | Life Insurers | | P & C Insurers | |
| County | Domestic | Foreign | Domestic | Foreign |
| Autauga | 27 | 28 | 19 | 24 |
| Baldwin | 68 | 85 | 89 | 126 |
| Barbour | 49 | 22 | 45 | 24 |
| Bibb | 15 | 7 | 9 | 3 |
| Blount | 37 | 19 | 18 | 26 |
| Bullock | 12 | 8 | 15 | 3 |
| Butler | 33 | 22 | 21 | 13 |
| Calhoun | 120 | 106 | 99 | 70 |
| Chambers | 32 | 21 | 25 | 15 |
| Cherokee | 18 | 12 | 22 | 8 |
| Chilton | 27 | 16 | 15 | 10 |
| Choctaw | 19 | 9 | 16 | 7 |
| Clarke | 43 | 23 | 32 | 30 |
| Clay | 10 | 12 | 18 | 5 |
| Cleburne | 10 | 3 | 5 | 4 |
| Coffee | 59 | 21 | 67 | 33 |
| Colbert | 50 | 40 | 32 | 35 |
| Conecuh | 10 | 6 | 11 | 8 |
| Coosa | 5 | 0 | 2 | 0 |
| Covington | 58 | 30 | 55 | 39 |
| Crenshaw | 16 | 6 | 16 | 8 |
| Cullman | 66 | 33 | 45 | 37 |
| Dale | 33 | 29 | 29 | 22 |
| Dallas | 63 | 41 | 30 | 44 |
| DeKalb | 78 | 13 | 68 | 25 |
| Elmore | 51 | 25 | 34 | 31 |
| Escambia | 45 | 36 | 49 | 64 |
| Etowah | 153 | 67 | 70 | 68 |
| Fayette | 21 | 11 | 13 | 11 |
| Franklin | 30 | 21 | 39 | 27 |
| Geneva | 27 | 15 | 30 | 27 |

THOMPSON EXHIBIT 11—Continued

| County | Number of Licensed Agents, January 1, 1982 | | | |
|---|---|---|---|---|
| | Life Insurers | | P & C Insurers | |
| | Domestic | Foreign | Domestic | Foreign |
| Greene | 10 | 2 | 2 | 5 |
| Hale | 11 | 7 | 9 | 5 |
| Henry | 18 | 5 | 14 | 4 |
| Houston | 94 | 117 | 97 | 56 |
| Jackson | 54 | 28 | 22 | 23 |
| Jefferson | 631 | 1,084 | 440 | 1,213 |
| Lamar | 22 | 5 | 20 | 22 |
| Lauderdale | 67 | 63 | 62 | 74 |
| Lawrence | 25 | 9 | 17 | 14 |
| Lee | 80 | 73 | 74 | 37 |
| Limestone | 42 | 23 | 39 | 22 |
| Lowndes | 6 | 5 | 7 | 3 |
| Macon | 5 | 8 | 11 | 8 |
| Madison | 117 | 203 | 114 | 191 |
| Marengo | 36 | 13 | 42 | 14 |
| Marion | 45 | 18 | 15 | 30 |
| Marshall | 90 | 43 | 72 | 52 |
| Mobile | 226 | 475 | 275 | 416 |
| Montgomery | 206 | 292 | 190 | 248 |
| Monroe | 29 | 20 | 18 | 17 |
| Morgan | 100 | 57 | 70 | 57 |
| Perry | 22 | 4 | 14 | 6 |
| Pickens | 22 | 8 | 8 | 3 |
| Pike | 50 | 24 | 42 | 33 |
| Randolph | 25 | 12 | 15 | 7 |
| Russell | 30 | 31 | 41 | 19 |
| Shelby | 49 | 55 | 42 | 88 |
| St. Clair | 45 | 17 | 29 | 24 |
| Sumter | 21 | 8 | 5 | 18 |
| Talladega | 75 | 47 | 43 | 59 |
| Tallapoosa | 38 | 35 | 27 | 30 |
| Tuscaloosa | 100 | 109 | 114 | 127 |
| Walker | 76 | 38 | 43 | 39 |
| Washington | 13 | 10 | 2 | 4 |
| Wilcox | 12 | 4 | 6 | 4 |
| Winston | 39 | 12 | 14 | 7 |
| Totals | 3,806 | 3,761 | 3,093 | 3,826 |

Source: Records of Alabama Department of Insurance.



THOMPSON EXHIBIT 12

Comparison of Premiums Written in Alabama and Admitted Assets in Alabama of Largest Foreign and Domestic Life Insurance and P and C Insurance Companies in Alabama, 1981

| | Premiums Written in Alabama in 1981 | Total Premiums Written in 1981 | Admitted Assets in Alabama as of December 31, 1981 | Percent in Alabama | Total Admitted Assets as of December 31, 1981 | Percent in Alabama |
|---|---|---|---|---|---|---|
| FOREIGN | | | | | | |
| Life | | | | | | |
| Prudential | $ 63,450,797 | $ 5,623,210,027 | $ none reported | 0.74% | $ 62,498,540,371 | —% |
| Aetna | 47,681,920 | 3,458,465,584 | 280,522,532 | 1.37 | 25,158,903,696 | 1.12 |
| Metropolitan | 45,757,523 | 5,972,075,118 | 653,210,483 | 0.77 | 51,757,844,543 | 1.26 |
| Equitable | 39,035,746 | 3,784,683,692 | 332,438,778 | 1.03 | 36,758,159,587 | 0.90 |
| New York Life | 37,972,178 | 2,473,658,992 | 274,245,696 | 1.54 | 21,119,316,399 | 1.30 |
| Provident | 30,027,579 | 279,171,734 | 40,017,579 | 10.76 | 1,951,229,589 | 2.07 |
| Independent | 24,331,444 | 214,951,155 | 36,413,143 | 11.32 | 679,956,999 | 5.35 |
| Travelers | 24,292,902 | 2,706,292,629 | none reported | 0.90 | 14,803,168,131 | — |
| John Hancock | 18,257,933 | 2,109,128,763 | 252,434,943 | 0.87 | 19,936,797,865 | 1.27 |
| State Farm Life | 17,496,423 | 644,077,039 | 40,015,193 | 2.72 | 3,759,728,515 | 1.06 |
| Total | $348,104,445 | $30,565,712,732 | $1,909,299,345 | 1.15% | $238,423,734,995 | 1.19%* |
| Property and Casualty | | | | | | |
| State Farm M. Auto. | $115,249,946 | $ 5,857,925,981 | $ 167,170,553 | 1.97% | $ 11,537,227,227 | 1.45 |
| Allstate Ins. | 83,662,446 | 5,172,836,671 | 224,426,429 | 1.62 | 8,621,922,574 | 2.60 |
| State Farm Fire | 63,418,670 | 2,603,299,784 | 52,969,703 | 2.44 | 3,583,572,965 | 1.48 |
| U.S. Fidelity & Guar. | 40,707,816 | 1,604,281,254 | none reported | 2.54 | 4,151,174,000 | — |
| Auto-Owners | 23,705,030 | 446,091,026 | 11,324,404 | 5.31 | 949,263,021 | 1.21 |
| Ins. Co. of N. Am. | 22,490,871 | 2,028,456,038 | none reported | 1.10 | 3,707,562,662 | — |
| Fidelity and Casualty | 21,289,383 | 349,082,070 | 44,705,181 | 6.13 | 396,251,834 | 11.28 |
| St. Paul Fire | 13,229,280 | 1,045,229,471 | 90,593,381 | 1.27 | 3,515,492,560 | 2.58 |
| Liberty Mutual | 12,613,217 | 1,147,761,992 | none reported | 1.10 | 6,121,225,954 | — |
| Home Indemnity | 8,018,194 | 745,147,404 | 7,297,169 | 1.08 | 372,316,788 | 1.95 |
| Total | $404,415,813 | $21,000,121,671 | $ 599,581,819 | 1.93% | $ 42,872,039,666 | 2.67%* |

THOMPSON EXHIBIT 12—Continued

| | Premiums Written in Alabama in 1981 | Total Premiums Written in 1981 | Percent in Alabama | Admitted Assets in Alabama as of December 31, 1981 | Total Admitted Assets as of December 31, 1981 | Percent in Alabama |
|---|---|---|---|---|---|---|
| **DOMESTIC** | | | | | | |
| **Life** | | | | | | |
| Liberty National | $151,684,736 | $ 283,184,233 | 53.56% | $ 619,347,652 | $ 1,665,574,803 | 37.19% |
| Protective Life | 45,428,700 | 114,237,453 | 39.77 | 68,323,253 | 417,430,130 | 16.37 |
| Mutual Savings Life | 30,301,553 | 40,703,400 | 74.44 | 88,322,805 | 172,940,976 | 45.78 |
| Federated Guaranty | 17,921,697 | 62,227,834 | 28.80 | 20,577,240 | 86,364,494 | 23.83 |
| Life Ins. Co. of Ala. | 8,219,606 | 13,964,442 | 59.39 | 28,472,170 | 40,223,113 | 70.79 |
| So. United Life | 6,648,904 | 9,383,287 | 70.86 | 16,508,752 | 27,405,993 | 60.24 |
| Old Southern | 6,971,429 | 8,624,597 | 70.49 | 7,729,231 | 14,208,629 | 54.40 |
| Natl. Security Ins. | 4,728,133 | 6,127,497 | 77.16 | 13,582,947 | 28,117,758 | 48.31 |
| Loyal American | 3,707,525 | 21,879,018 | 16.95 | 8,467,323 | 64,581,979 | 13.11 |
| Employers Life | 3,342,657 | 3,342,657 | 100.00 | 2,545,942 | 4,415,568 | 57.66 |
| Total | $278,954,942 | $ 563,573,228 | 49.34% | $ 873,877,315 | $ 2,521,272,424 | 34.66% |
| **Property and Casualty** | | | | | | |
| Ala. Farm Bureau M.C. | $ 87,614,211 | $ 87,614,211 | 100.00% | $ 61,413,134 | $ 166,254,031 | 36.94% |
| Mutual Assurance | 24,540,938 | 24,540,948 | 100.00 | 6,783,083 | 51,784,960 | 13.10 |
| Hartford Ins. Co. of Ala. | 14,014,847 | 14,014,847 | 100.00 | not available | 31,446,964 | — |
| Federated Guaranty | 8,943,739 | 10,420,169 | 85.83 | 3,949,195 | 19,613,082 | 20.14 |
| American Liberty | 6,357,074 | 18,457,356 | 34.40 | 5,172,537 | 21,936,792 | 23.69 |
| So. Guaranty | 6,282,499 | 19,447,234 | 32.31 | 7,900,209 | 25,997,804 | 30.40 |
| Standard Fire | 6,118,994 | 12,739,266 | 48.03 | not available | 8,124,759 | — |
| Ala. Farm Bureau Mutual | 5,368,134 | 5,368,134 | 100.00 | 22,434,849 | 111,331,285 | 20.15 |
| Natl. Security Fire | 5,097,189 | 22,045,493 | 22.71 | 5,606,969 | 21,663,483 | 25.88 |
| Champion Ins. | 4,714,000 | 4,714,000 | 100.00 | 2,354,070 | 6,628,730 | 35.51 |
| Total | $168,961,655 | $ 219,384,658 | 77.02% | $ 115,614,046 | $ 464,671,982 | 27.29%* |

* Average of firms reporting their admitted assets in Alabama.

Note: The companies listed under each category are the ten largest firms based on total premiums written in Alabama.

Sources: For foreign companies, 1981 Annual Statements filed with Alabama Department of Insurance; for domestic companies, response to survey forms sent out by Association of Alabama Life Insurance Companies.

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THOMPSON EXHIBIT 13

Comparison of Bank Deposits of Largest Foreign and Domestic Life Insurers and P & C Insurance Companies in Alabama, at December 31, 1981

| | Deposits in Alabama | Total Deposits | Alabama Deposits as a % of Total Deposits |
|---|---|---|---|
| **FOREIGN** | | | |
| **Life** | | | |
| Prudential | $ 386,536 | $156,459,443 | 0.4% |
| Aetna | 0 | 18,413,196 | 0.0 |
| Metropolitan | 169,318 | 76,190,621 | 0.2 |
| Equitable | 0 | 73,963,960** | 0.0 |
| New York Life | 212,613 | 44,824,425 | 0.5 |
| Provident | 0 | 28,354,771 | 0.0 |
| Independent | 0 | 2,029,444 | 0.0 |
| Travelers | 0 | 170,529,417 | 0.0 |
| John Hancock | 0 | 28,181,985 | 0.0 |
| State Farm Life | 0 | 6,691,636 | 0.0 |
| Total | $ 768,467 | $589,159,479 | 0.1% |
| **Property and Casualty** | | | |
| State Farm M. Auto. | $ 413,647 | $ 59,669,573 | 0.7% |
| Allstate | 0 | 25,417,132 | 0.0 |
| State Farm Fire | 161,922 | 34,699,100 | 0.5 |
| U.S. Fidelity & G. | 0 | 44,862,431 | 0.0 |
| Auto-Owners | 0 | 10,858,671 | 0.0 |
| Ins. Co. of N. Amer. | 0 | 72,886,865 | 0.0 |
| Fidelity & Casualty | 0 | 61,955 | 0.0 |
| St. Paul Fire* | 0 | 962,319 | 0.0 |
| Liberty Mutual | 0 | 20,164,529 | 0.0 |
| Home Indemnity | 0 | 74,965 | 0.0 |
| Total | $ 575,569 | $353,638,315 | 0.2% |

THOMPSON EXHIBIT 13—Continued

| | Deposits in Alabama | Total Deposits | Alabama Deposits as a % of Total Deposits |
|---|---|---|---|
| DOMESTIC | | | |
| Life | | | |
| Liberty National | $ 4,163,196 | $ 6,258,431 | 66.7% |
| Protective Life | 961,742 | 2,348,723 | 40.9 |
| Mutual Savings Life* | 1,743,970 | 1,133,226 | 153.9* |
| Federated Guar. Life | 803,030 | 803,030 | 100.0 |
| So. United Life | 2,630,034 | 3,145,508 | 83.6 |
| Old Southern Life | 789,794 | 789,794 | 100.0 |
| National Security | 425,134 | 427,702 | 99.4 |
| Loyal American | 1,110,233 | 1,110,233 | 100.0 |
| Employers Life | 290,712 | 290,712 | 100.0 |
| Life Ins. Co. of Ala. | 661,775 | 1,624,677 | 40.7 |
| Total | $13,519,662 | $ 17,852,080 | 75.7% |
| Property and Casualty | | | |
| Ala. Farm Bureau M.C. | $ 1,402,979 | $ 1,402,979 | 100.0% |
| Mutual Assurance | 312,276 | 312,276 | 100.0 |
| Hartford Ins. Co. of Ala. | 3,256 | 25,225 | 12.9 |
| Federated Guar. M. | 14,782 | 29,044 | 50.9 |
| American Liberty | 1,551,087 | 1,639,492 | 94.6 |
| So. Guaranty | 1,217,491 | 1,217,491 | 100.0 |
| Standard Fire | 2,685,499 | 2,737,043 | 98.1 |
| Ala. Farm Bureau M.I. | 1,880,472 | 1,880,472 | 100.0 |
| Natl. Sec. Fire | 28,856 | 28,856 | 100.0 |
| Champion Insurance | 566,561 | 572,429 | 99.0 |
| Total | $ 9,662,309 | $ 9,844,290 | 98.2% |

Note: The companies listed under each category are the ten largest firms based on total premiums written in Alabama.

Source: 1981 Annual Statements filed with Alabama Department of Insurance.

* Discrepancies due to overdrafts.

** As per balance sheet in 1981 Annual Statement.



# THOMPSON EXHIBIT 14

Calculations of Net Capital Drains from Alabama Due to Underinvestment in Alabama Assets: A Sample of Largest Foreign Insurers

| | Largest Foreign Life Insurers* | Largest Foreign P & C Insurers** |
|---|---|---|
| Total premiums written in 1981 | $19,136,210,000 | $16,219,622,000 |
| Increase in total admitted assets from 12/31/80 to 12/13/81 | 11,610,865,000 | 2,636,485,000 |
| Ratio of increase in admitted assets to total premiums written | 60.7% | 16.3% |
| Expected increase in admitted assets in Alabama based on 1981 premiums written in Alabama by foreign insurers<br>Life: $260.4 million<br>P & C: $328.7 million | 158,100,000 | 53,600,000 |
| Actual reported increase in admitted assets in Alabama from 12/31/80 to 12/31/81 | 38,640,000 | 21,292,000 |
| Net drain of funds from Alabama due to "underinvestment" in Alabama assets | 119,460,000 | 32,308,000 |

*Data for Prudential and Travelers were completely excluded from all calculations because their admitted assets in Alabama were not reported.

**Data for U.S. Fidelity & Guaranty, Fidelity and Casualty, and Liberty Mutual were excluded from all calculations because their admitted assets in Alabama were not reported.

Sources: Information in Thompson Exhibit 12 and 1980 Annual Statements filed with Alabama Department of Insurance.

APPENDIX A

This table is intended as a general reference of the premium tax rates as of 1977; it does not include special exemptions and other key features. A summary of special exemptions and key features as of 1977 may be found in Council of State Governments, State Retaliatory Taxation of the Insurance Industry, Lexington, Kentucky, 1977, Appendix I, pp. 19-38.

A Summary of the Domestic and Foreign Life Insurance Premium Taxation Rates Imposed by the States and the District of Columbia, 1977

| State or Other Jurisdiction | Insurance Premium Tax Rates (in percentages) Domestic | Foreign | State or Other Jurisdiction | Insurance Premium Tax Rates (in percentages) Domestic | Foreign |
|---|---|---|---|---|---|
| Alabama | 1 | 3[a] | Montana | 2.75 | 2.75 |
| Alaska | 1.5 | 3 | Nebraska | 0.4 | 2 |
| Arizona | 1 | 2 | Nevada | 2 | 2 |
| Arkansas | 0 | 2.5 | New Hampshire | 2 | 2 |
| California | 2.35 | 2.35 | New Jersey | 2 | 2 |
| Colorado | 2.25 | 2.25 | New Mexico | 2.5 | 2.5 |
| Connecticut | 2 | 2 | New York | 1.4 | 1.4 |
| Delaware | 1.75 | 1.75 | North Carolina | 1.5 | 2.5 |
| Florida | 0 | 2 | North Dakota | 2.5 | 2.5 |
| Georgia | 2.25 | 2.25 | Ohio | 0 | 2.5 |
| Hawaii[b] | 1.755 | 2.925 | Oklahoma | 0 | 4 |
| Idaho | 3 | 3 | Oregon | 0 | 2.25 |
| Illinois | 0 | 2 | Pennsylvania | 2 | 2 |
| Indiana | 0 | 2 | Rhode Island | 2 | 2 |
| Iowa | 2 | 2 | South Carolina | 2 | 2 |
| Kansas | 1 | 2 | South Dakota | 0.5 | 2.5 |
| Kentucky | 0 | 2 | Tennessee | 1.75 | 2 |
| Louisiana | c | c | Texas | 1.1 | 3.3 |
| Maine | 1 | 2 | Utah | 2.25 | 2.25 |
| Maryland | 2 | 2 | Vermont | 2 | 2 |
| Massachusetts | 2 | 2 | Virginia | 2.25 | 2.25 |
| Michigan | 0 | 2 | Washington | 1 | 2 |
| Minnesota | 2 | 2 | West Virginia | 3 | 3 |
| Mississippi | 1.5 | 3 | Wisconsin | 0 | 2 |
| Missouri | 2 | 2 | Wyoming | 1.5 | 2.5 |
| | | | Dist. of Columbia | 2 | 2 |

[a]The 3% tax rate is on life insurance premiums only; a 4% tax rate is applied to all other types of premiums.

[b]Does not have retaliatory insurance taxation.

[c]Rates for foreign and domestic: $140 for first $7,000 in premiums plus $170 for additional $10,000.



Appendix B

LIFE INSURANCE

| State or Other Jurisdiction | | Premium Tax Rates (in Percentage) Domestic | Foreign |
|---|---|---|---|
| Alabama | | | |
| | 1935 | 0 | 2.5 |
| | 1945 | 2.5 | 2.5 |
| | 1955 | 2.5 | 3.0 |
| | 1969 | 1.0 | 3.0 |
| | Current | 1.0 | 3.0 |
| Alaska | | | |
| | 1933 | 2.0 | 2.0 |
| | 1957 | 1.0 | 2.0 |
| | 1966 | 1.5 | 3.0 |
| | Current | 1.5 | 3.0 |
| Arizona | | | |
| | 1928 | 0 | 2.0 |
| | 1954 | 1.0 | 2.0 |
| | Current | 1.0 | 2.0 |
| Arkansas | | | |
| | 1937 | 2.5 | 2.5 |
| | 1948 | 0 | 2.5 |
| | Current | 0 | 2.5 |
| Florida | | | |
| | 1927 | 2.0 | 2.0 |
| | 1949 | 0 | 2.0 |
| | Current | 0 | 2.0 |
| Hawaii | | | |
| | 1945 | 2.25 | 2.25 |
| | 1956 | 1.125* | 2.25 |
| | 1963 | 1.5 | 2.5 |
| | 1965 | 1.755 | 2.925 |
| | 1978 | 1.918 | 3.197 |
| | Current | 1.918 | 3.197 |

*Reduction of 1% per year until domestic rate equaled one-half of foreign rate.

| | | | |
|---|---|---|---|
| **Illinois** | | | |
| | 1935 | 0 | 2.0 |
| | Current | 0 | 2.0 |
| **Indiana** | | | |
| | 1932 | 0 | 2.0 |
| | 1963 | 0* | 2.0 |
| | 1974 | 0* | 2.0 |
| | Current | 0* | 2.0 |

*Domestic may elect to pay the tax

| | | | |
|---|---|---|---|
| **Kansas** | | | |
| | 1935 | 0 | 2.0 |
| | 1970 | 1.0 | 2.0 |
| | Current | 1.0 | 2.0 |
| **Kentucky** | | | |
| | 1936 | 0 | 2.0 |
| | Current | 0 | 2.0 |
| **Maine** | | | |
| | 1930 | 2.0 | 1.5 |
| | 1943 | 1.0 | 2.0 |
| | Current | 1.0 | 2.0 |
| **Michigan** | | | |
| | 1929 | 0 | 2.0 |
| | Current | 0 | 2.0 |
| **Mississippi** | | | |
| | 1940 | 0 | 2.25 |
| | 1972 | 1.5 | 2.0 |
| | 1978 | 1.5* | 2.0 |
| | Current | 1.5* | 2.0 |

*Domestic Mutual, 1%

| | | | |
|---|---|---|---|
| **Nebraska** | | | |
| | 1932 | 0 | 2.0 |
| | 1933 | .4 | 2.0 |
| | 1961 | .6 | 2.0 |
| | Current | .6 | 2.0 |



| | | | |
|---|---|---|---|
| **North Carolina** | | | |
| | 1945 | 2.0 | 2.5 |
| | 1947 | 1.0 | 2.5 |
| | 1955 | 1.5 | 2.5 |
| | Current | 1.5 | 2.5 |
| **Ohio** | | | |
| | 1934 | 0 | 2.5 |
| | Current | 0 | 2.5 |
| **Oklahoma** | | | |
| | 1941 | 0 | 4.0 |
| | 1945 | 4.0 | 4.0 |
| | 1947 | 0 | 4.0 |
| | Current | 0 | 4.0 |
| **Oregon** | | | |
| | 1930 | 0 | 1.25 |
| | 1967 | 0 | 2.25 |
| | Current | 0 | 2.25 |
| **South Dakota** | | | |
| | 1939 | 1.0 | 2.5 |
| | 1951 | .5 | 2.5 |
| | Current | .75 | 2.5 |
| **Tennessee** | | | |
| | 1934 | 1.5 | 2.5 |
| | 1937 | 0 | 2.5 |
| | 1945 | 2.0 | 2.0 |
| | 1957 | 1.75 | 2.0 |
| | Current | 1.75 | 2.0 |
| **Texas** | | | |
| | 1893 | 1.25 | 1.25 |
| | 1897 | 2.0 | 2.0 |
| | 1907 | 2.0 | 2.0 |
| | 1929 | 0 | 2.0 |
| | 1936 | .5 | 2.0 |
| | 1951 | 1.1 | 2.2 |
| | Current | 1.1 | 2.2 |
| **Washington** | | | |
| | 1932 | 2.25 | 2.25 |
| | 1940 | 1.0 | 2.25 |
| | 1945 | 2.0 | 2.0 |
| | 1947 | 1.0 | 2.0 |
| | Current | 1.0 | 2.0 |
| **Wisconsin** | | | |
| | 1933 | 0 | 2.0 |
| | Current | 0 | 2.0 |
| **Wyoming** | | | |
| | 1931 | 2.5 | 2.5 |
| | 1967 | 1.5 | 2.5 |
| | Current | 1.5 | 2.5 |

# EXHIBIT 1

NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | | $ |
| Policy Loans | | |
| Bank Deposits | | |
| Mortgage Loans on Real Estate | | |
| Data Processing Equipment | | |
| U. S. Government Securities | | |
| Political Subdivision Bonds | | |
| Special Revenue Assessment Bonds | | |
| Repurchase Agreements | | |
| Industrial and Miscellaneous Bonds | | |
| Preferred Stock | | |
| Common Stock | | |
| Public Utilities Bonds | | |
| | Total | |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | | $ |
| Accident and Health | | |
| Annuities | | |
| | Total | $ |

(3) Alabama Employees

| | | |
|---|---|---|
| Home Office | | |
| Field Clerical | | |
| | Total | |

(4) Alabama Payroll

| | | |
|---|---|---|
| Home Office | | $ |
| Field Clerical | | |
| | Total | |

Name of Insurance Company

Date

By

Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202



# EXHIBIT 2

MUTUAL ASSURANCE SOCIETY OF ALABAMA
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | | $ 388,868 |
| Policy Loans | | 0 |
| Bank Deposits | | 312,375 |
| Mortgage Loans on Real Estate | | 0 |
| Data Processing Equipment | | 89,480 |
| U. S. Government Securities | | 12,000 |
| Political Subdivision Bonds | | 5,980,000 |
| Special Revenue Assessment Bonds | | 0 |
| Repurchase Agreements | | 0 |
| Industrial and Miscellaneous Bonds | | 0 |
| Preferred Stock | | 0 |
| Common Stock | | 0 |
| Public Utilities Bonds | | 0 |
| | Total | $6,781,083 |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | | $ 0 |
| Accident and Health | | 0 |
| Annuities | | 0 |
| | Total | 0 |

(3) Alabama Employees

| | | |
|---|---|---|
| Home Office | | 30 |
| Field Clerical | | 5 |
| | Total | 35 |

(4) Alabama Payroll

| | | |
|---|---|---|
| Home Office | | $ 494,460 |
| Field Clerical | | 141,530 |
| | Total | $635,990 |

MUTUAL ASSURANCE SOCIETY OF ALABAMA
Name of Insurance Company

2/23/82
Date

By Dale J. Wilson
Title Treasurer

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202

# EXHIBIT 3

SOUTHERN UNITED LIFE INSURANCE COMPANY
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ 3,710,089 |
| Policy Loans | 600,000 |
| Bank Deposits | 1,006,059 |
| Mortgage Loans on Real Estate | 3,540,284 |
| Data Processing Equipment | 263,786 |
| U. S. Government Securities | 360,681 |
| Political Subdivision Bonds | 534,557 |
| Special Revenue Assessment Bonds | 3,092,825 |
| Repurchase Agreements | -0- |
| Industrial and Miscellaneous Bonds | 305,979 |
| Preferred Stock | 232,378 |
| Common Stock | 101,424 |
| Public Utilities Bonds | 340,692 |
| Total | 14,508,713 |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $ 5,386,312 |
| Accident and Health | 1,262,792 |
| Annuities | -0- |
| Total | 6,648,104 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 61 |
| Field Clerical | 14 |
| Total | 75 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ 874,524 |
| Field Clerical | 99,213 |
| Total | 973,737 |

Southern United Life Insurance Company
Name of Insurance Company

March 1, 1982
Date

By _____
Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202



# EXHIBIT 4

PROTECTIVE LIFE INSURANCE COMPANY
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ |
| Policy Loans | |
| Bank Deposits | |
| Mortgage Loans on Real Estate | |
| Data Processing Equipment | |
| U. S. Government Securities | |
| Political Subdivision Bonds | |
| Special Revenue Assessment Bonds | |
| Repurchase Agreements | |
| Industrial and Miscellaneous Bonds | |
| Preferred Stock | |
| Common Stock | |
| Public Utilities Bonds | |
| Total | |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $ 20,091,904 |
| Accident and Health | 20,974,865 |
| Annuities | 1,361,931 |
| Total | 42,428,700 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 379 |
| Field Clerical | 2 |
| Total | 381 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ |
| Field Clerical | |
| Total | Approximation: 7,832,368 |

Protective Life Insurance Company
Name of Insurance Company

March 1, 1982
Date

By _____
Title
Vice President

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202

# EXHIBIT 5

NATIONAL SECURITY INSURANCE COMPANY
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | $ | 534,368 |
| Policy Loans | | 382,581 |
| Bank Deposits | | 427,917 |
| Mortgage Loans on Real Estate | | 2,120,017 |
| Data Processing Equipment | | |
| U. S. Government Securities | | |
| Political Subdivision Bonds | | 13,018 |
| Special Revenue Assessment Bonds | | |
| Repurchase Agreements | | |
| Industrial and Miscellaneous Bonds | | |
| Preferred Stock | | 29,625 |
| Common Stock | | 9,807,168 |
| Public Utilities Bonds | | 268,253 |
| Total | | 13,582,947 |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | $ | 3,525,477 |
| Accident and Health | | 1,202,656 |
| Annuities | | |
| Total | | 4,728,133 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 53 |
| Field Clerical | 17 |
| Total | |

(4) Alabama Payroll

| | | |
|---|---|---|
| Home Office | $ | 749,675.09 |
| Field Clerical | | 104,195.79 |
| Total | | |

NATIONAL SECURITY INSURANCE COMPANY
Name of Insurance Company

3/22/82
Date

By Treasurer
Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202



# EXHIBIT 6

[illegible] Life Insurance Company of Alabama, Inc.
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | $ | 0.00 |
| Policy Loans | | 794,709.00 |
| Bank Deposits | | 33,697.00 |
| Mortgage Loans on Real Estate | | 346,280.00 |
| Data Processing Equipment | | 0.00 |
| U. S. Government Securities | | 674,603.00 |
| Political Subdivision Bonds | | 0.00 |
| Special Revenue Assessment Bonds | | |
| Repurchase Agreements | | 0.00 |
| Industrial and Miscellaneous Bonds | | 50,384.00 |
| Preferred Stock | | 0.00 |
| Common Stock | | 369,270.00 |
| Public Utilities Bonds | | 77,178.00 |
| Total | | 2,543,942.00 |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | $ | 680,136.00 |
| Accident and Health | | 2,571,189.00 |
| Annuities | | 0.00 |
| Total | | 3,251,325.00 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 38 |
| Field Clerical | 0 |
| Total | 38 |

(4) Alabama Payroll

| | | |
|---|---|---|
| Home Office | $ | 329,861.00 |
| Field Clerical | | 0.00 |
| Total | | 329,861.00 |

[illegible] Life Insurance Company of Alabama, Inc.
Name of Insurance Company

February 22, 1982
Date

By Thomas S. Gayner, President
Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202

# EXHIBIT 7

NATIONAL SECURITY FIRE AND CASUALTY COMPANY
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | | $ 103,998 |
| Policy Loans | | |
| Bank Deposits | | 39,836 |
| Mortgage Loans on Real Estate | | 855,513 |
| Data Processing Equipment | | 180,705 |
| U. S. Government Securities | | |
| Political Subdivision Bonds | | 1,667,062 |
| Special Revenue Assessment Bonds | | 2,849,324 |
| Repurchase Agreements | | |
| Industrial and Miscellaneous Bonds | | |
| Preferred Stock | | |
| Common Stock | | 42,866 |
| Public Utilities Bonds | | 197,164 |
| | Total | 5,836,836 |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | | |
| Property | | |
| Accident and Health Casualty | | $4,471,366 |
| Annuities | | 535,822 |
| | Total | 5,007,188 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 30 |
| Field Clerical | 0 |
| Total | 30 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ 345,029 |
| Field Clerical | 0 |
| Total | 345,029 |

NATIONAL SECURITY FIRE AND CASUALTY
Name of Insurance Company

3/22/82
Date

By Controller
Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202



# EXHIBIT 8

LIFE INSURANCE COMPANY OF ALABAMA
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | | $ 913,783 |
| Policy Loans | | 2,110,958 |
| Bank Deposits | | 103,775 |
| Mortgage Loans on Real Estate | | 22,251,903 |
| Data Processing Equipment | | 249,497 |
| U. S. Government Securities | | 414,318 |
| Political Subdivision Bonds | | 533,902 |
| Special Revenue Assessment Bonds | | 1,164,292 |
| Repurchase Agreements | | -0- |
| Industrial and Miscellaneous Bonds | | 320,000 |
| Preferred Stock | | 263,833 |
| Common Stock | | 178,033 |
| Public Utilities Bonds | | 468,758 |
| | Total | $30,472,278 |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $ 5,450,808 |
| Accident and Health | 2,575,742 |
| Annuities | 191,058 |
| Total | $ 8,215,608 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 98 |
| Field Clerical | 12 |
| Total | 110 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $1,304,794.39 |
| Field Clerical | 83,898.13 |
| Total | $1,388,692.52 |

LIFE INSURANCE COMPANY OF ALABAMA
Name of Insurance Company

February 22, 1982
Date

By
Title
Executive Vice President & Treasurer

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202

# EXHIBIT 9

LIBERTY NATIONAL LIFE INSURANCE COMPANY

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real Estate | $ 20,385,725 |
| Policy Loans | 97,774,589 |
| Bank Deposits | 15,462,352 |
| Mortgage Loans on Real Estate | 72,695,195 |
| Data Processing Equipment | 2,457,513 |
| U. S. Government Securities | 189,303,186 |
| Political Subdivision Bonds | 3,789,000 |
| Special Revenue Assessment Bonds | 16,307,067 |
| Repurchase Agreements | 2,300,000 |
| Industrial and Miscellaneous Bonds | 20,045,115 |
| Preferred Stock | 12,900,000 |
| Common Stock | 145,182,938 |
| Public Utilities Bonds | 179,370 |
| | $519,347,633 |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $104,331,403 |
| Accident and Health | 43,525,782 |
| Annuities | 3,827,551 |
| | $151,684,736 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 1,042 |
| Field Clerical | 161 |
| | 1,203 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ 18,935,439 |
| Field Clerical | 1,858,238 |
| | $ 20,793,677 |



# EXHIBIT 10

AMERICAN LIBERTY INSURANCE COMPANY
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | | $ 421 |
| Policy Loans | | -0- |
| Bank Deposits (Includes C.D.'s) | | 1,551,007 |
| Mortgage Loans on Real Estate | | 934,048 |
| Data Processing Equipment | | -0- |
| U. S. Government Securities | | 1,100,040 |
| Political Subdivision Bonds | | 71,950 |
| Special Revenue Assessment Bonds | | 750,000 |
| Repurchase Agreements | | 170,000 |
| Industrial and Miscellaneous Bonds | | 300,000 |
| Preferred Stock | | -0- |
| Common Stock | | 970,279 |
| Public Utilities Bonds | | 200,352 |
| | Total | $6,170,697 |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | | $ -0- |
| Accident and Health | | -0- |
| Annuities | | -0- |
| Property and Casualty | | [illegible] |
| | Total | [illegible] |

(3) Alabama Employees

| | | |
|---|---|---|
| Home Office | | 99 |
| Field Clerical | | -0- |
| | Total | 99 |

(4) Alabama Payroll

| | | |
|---|---|---|
| Home Office | | $1,350,000 |
| Field Clerical | | -0- |
| | Total | 1,350,000 |

AMERICAN LIBERTY INSURANCE COMPANY
Name of Insurance Company

February 10, 1982
Date

By _____
David H. Pelham
Title Vice President & Treasurer

PLEASE SEND THIS INFORMATION TO:

Ira L. Gustafson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202

EDITOR'S NOTE

PAGES 393 thru end WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

# EXHIBIT 11

[illegible]

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ [illegible] |
| Policy Loans | - |
| Bank Deposits | [illegible] |
| Mortgage Loans on Real Estate | - |
| Data Processing Equipment | [illegible] |
| U. S. Government Securities | [illegible] |
| Political Subdivision Bonds | - |
| Special Revenue Assessment Bonds | - |
| Repurchase Agreements | - |
| Industrial and Miscellaneous Bonds | - |
| Preferred Stock | [illegible] |
| Common Stock | - |
| Public Utilities Bonds | - |
| Total | [illegible] |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $ |
| Accident and Health | |
| Annuities | |
| Property & Casualty | |
| Total | [illegible] |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 41 |
| Field Clerical | - |
| Total | 41 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ [illegible] |
| Field Clerical | |
| Total | [illegible] |

CHAMPION INSURANCE COMPANY
Name of Insurance Company

February 11, 1982
Date

By [signature]
Title President

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202



# EXHIBIT 12

[illegible]

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ [illegible] |
| Policy Loans | [illegible] |
| Bank Deposits | [illegible] |
| Mortgage Loans on Real Estate | [illegible] |
| Data Processing Equipment | - |
| U. S. Government Securities | - |
| Political Subdivision Bonds | - |
| Special Revenue Assessment Bonds | $3,765,000 |
| Repurchase Agreements | - |
| Industrial and Miscellaneous Bonds | - |
| Preferred Stock | - |
| Common Stock | [illegible] |
| Public Utilities Bonds | [illegible] |
| Total | [illegible] |

(2) Alabama Premium Income

| | |
|---|---|
| Life | [illegible] |
| Accident and Health | |
| Annuities | |
| Total | |

(3) Alabama Employees

| | |
|---|---|
| Home Office | [illegible] |
| Field Clerical | |
| Total | |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ [illegible] |
| Field Clerical | |
| Total | |

[illegible]
Name of Insurance Company

[illegible]
Date

By [signature]
Title

# EXHIBIT 13

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company

Name of Company

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ |
| Policy Loans | |
| Bank Deposits | |
| Mortgage Loans on Real Estate | |
| Data Processing Equipment | |
| U. S. Government Securities | |
| Political Subdivision Bonds | |
| Special Revenue Assessment Bonds | |
| Repurchase Agreements | |
| Industrial and Miscellaneous Bonds | |
| Preferred Stock | |
| Common Stock | |
| Public Utilities Bonds | |
| Total | |

(2) Alabama Direct Premium Income

| | |
|---|---|
| Life | |
| Accident-and-Health | |
| Annuities | |
| Total | $ |

(3) Alabama Employees

| | |
|---|---|
| Home Office | |
| Field, Clerical, Agents | |
| Total | |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | |
| Field Clerical | |
| Total | $ |

Name of Insurance Company

Date

By

Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612



# EXHIBIT 14

Name of Company

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ |
| Policy Loans | |
| Bank Deposits | |
| Mortgage Loans on Real Estate | |
| Data Processing Equipment | |
| U. S. Government Securities | |
| Political Subdivision Bonds | |
| Special Revenue Assessment Bonds | |
| Repurchase Agreements | |
| Industrial and Miscellaneous Bonds | |
| Preferred Stock | |
| Common Stock | |
| Public Utilities Bonds | |
| Total | $ |

(2) Alabama Direct Premium Income

| | |
|---|---|
| Life | |
| Accident-and-Health | |
| Annuities | |
| Total | $ |

(3) Alabama Employees

| | |
|---|---|
| Home Office | |
| Field, Clerical, Agents | |
| Total | |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | |
| Field Clerical, Agents | $ |
| Total | |

Name of Insurance Company

Date

By

Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612

# EXHIBIT 15

Federated Guaranty Life Ins. Co.
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ [illegible] |
| Policy Loans | [illegible] |
| Bank Deposits | [illegible] |
| Mortgage Loans on Real Estate | [illegible] |
| Data Processing Equipment | -0- |
| U. S. Government Securities | [illegible] |
| Political Subdivision Bonds | [illegible] |
| Special Revenue Assessment Bonds | -0- |
| Repurchase Agreements | -0- |
| Industrial and Miscellaneous Bonds | -0- |
| Preferred Stock | [illegible] |
| Common Stock | -0- |
| Public Utilities Bonds | [illegible] |
| Total | 20,517,240 |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $ 12,040,916 |
| Accident and Health | [illegible] |
| Annuities | [illegible] |
| Total | 17,921,699 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | See Alabama Jan. Report Mutual Savings Life Ins. Co. |
| Field Clerical | |
| Total | |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | See Alabama Jan. Report Mutual Savings Life Ins. Co. |
| Field Clerical | |
| Total | |

Federated Guaranty Life Ins. Co.
Name of Insurance Company

2-12-82
Date

By [signature]
Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202



# EXHIBIT 16

MUTUAL SAVINGS LIFE INSURANCE COMPANY
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real estate | $ 5,732,184 |
| Policy Loans | 9,100,979 |
| Bank Deposits | 1,634,001 |
| Mortgage Loans on Real Estate | 12,391,029 |
| Data Processing Equipment | 693,678 |
| U. S. Government Securities | 34,242,899 |
| Political Subdivision Bonds | 31,318 |
| Special Revenue Assessment Bonds | 865,198 |
| Repurchase Agreements | -0- |
| Industrial and Miscellaneous Bonds | -0- |
| Preferred Stock | -0- |
| Common Stock | -0- |
| Public Utilities Bonds | 1,780,719 |
| Collateral Loans | 1,110,830 |
| | 1,800,000 |
| Total | 69,372,805 |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $20,658,159 |
| Accident and Health | 9,637,126 |
| Annuities | 6,268 |
| Total | 30,301,553 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 251 |
| Field Clerical | 67 |
| Total | 318 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ 2,660,885 |
| Field Clerical | 234,373 |
| Total | 2,895,258 |

MUTUAL SAVINGS LIFE INS. CO.
Name of Insurance Company

2/22/82
Date

By Don A. Johnson - Asst. Vice Pres.
Title

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202

# EXHIBIT 17

LOYAL AMERICAN LIFE INSURANCE COMPANY

1981 Data

(1) Alabama Investments

| | |
|---|---|
| Real Estate | $ 1,035,197.05 |
| Policy Loans | 3,114,077.60 |
| Bank Deposits | 716,058.23 |
| Mortgage Loans on Real Estate | 735,495.11 |
| Data Processing Equipment | 218,842.18 |
| U. S. Government Securities | 99,014.89 |
| Political Subdivision Bonds | -0- |
| Special Revenue Assessment Bonds | -0- |
| Repurchase Agreements | -0- |
| Industrial & Miscellaneous Bonds | 103,270.36 |
| Preferred Stock | 150,000.00 |
| Common Stock | 2,430,867.37 |
| Public Utilities Bonds | 821,341.89 |
| TOTAL | $ 9,417,371.71 |

(2) Alabama Premium Income

| | |
|---|---|
| Life | $ 3,679,914.52 |
| Accident and Health | 1,022,611.12 |
| Annuities | -0- |
| TOTAL | $ 4,707,525.64 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 60 |
| Field Clerical | 6 |
| TOTAL | 66 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ 1,112,012.00 |
| Field Clerical | -0- |
| TOTAL | $ 1,112,012.00 |

Loyal American Life Insurance Company

By _____
John C. Shaw, Senior Vice President-Treasurer

2-19-82
Date



# EXHIBIT 18

Southern Guaranty Insurance Company
NAME OF COMPANY

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | | $ 836,985 |
| Policy Loans | | |
| Bank Deposits | | 1,271,731 |
| Mortgage Loans on Real Estate | | 38,611 |
| Data Processing Equipment | | 79,277 |
| U. S. Government Securities | | |
| Political Subdivision Bonds | | 600,480 |
| Special Revenu. Assessment Bonds | | 2,081,128 |
| Repurchase Agreements | | |
| Industrial and Miscellaneous Bonds | | 1,351,850 |
| Preferred Stock | | |
| Common Stock | | 1,436,125 |
| Public Utilities Bonds | | |
| | Total | 7,900,209 |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | | $ |
| Accident and Health | | |
| Annuities | | |
| Fire & Casualty Premium | | 6,282,499 |
| | Total | 6,282,499 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 66 |
| Field Clerical | |
| Total | 66 |

(4) Alabama Payroll

| | | |
|---|---|---|
| Home Office | $ | 913,982 |
| Field Clerical | | |
| Total | | 913,982 |

Southern Guaranty Insurance Company
NAME OF COMPANY

February 19, 1982
Date

By C. P. Thompson, President and
Title Chairman of the Board

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202

## EXHIBIT 15

[illegible] Life Insurance Company
[illegible]

1981 Data

(1) Alabama Investments

| | | |
|---|---|---|
| Real estate | | $ 1,189,218 |
| Policy Loans | | 856,227 |
| Bank Deposits | | 798,794 |
| Mortgage Loans on Real Estate | | 3,466,169 |
| Data Processing Equipment | | 38,431 |
| U. S. Government Securities | | 254,687 |
| Political Subdivision Bonds | | 89,268 |
| Special Revenue Assessment Bonds | | 905,000 |
| Repurchase Agreements | | -0- |
| Industrial and Miscellaneous Bonds | | 48,340 |
| Preferred Stock | | 39,187 |
| Common Stock | | 13,650 |
| Public Utilities Bonds | | 1,050,334 |
| | Total | 7,729,251 |

(2) Alabama Premium Income

| | | |
|---|---|---|
| Life | | $ 814,078 |
| Accident and Health | | 5,311,441 |
| Annuities | | 50,525 |
| | Total | $ 6,087,764 |

(3) Alabama Employees

| | |
|---|---|
| Home Office | 57 |
| Field Clerical | 0 |
| Total | 57 |

(4) Alabama Payroll

| | |
|---|---|
| Home Office | $ 917,183 |
| Field Clerical | 0 |
| Total | 917,183 |

[illegible] Life Insurance Company
Name of Insurance Company

February 15, 1982
Date

By _____
Vice-President-Treasurer

PLEASE SEND THIS INFORMATION TO:

Ira L. Burleson, General Counsel
Liberty National Life Insurance Company
P. O. Box 2612
Birmingham, Alabama 35202



## EXHIBIT 1

### FOREIGN LIFE INSURANCE COMPANIES CLAIMING CREDIT FOR ALABAMA INVESTMENTS FOR THE YEAR 1980

| | | Tax Rate % |
|---|---|---|
| | AETNA Life Ins. Co. | 2.9 |
| | Allstate Life Ins. Co. | 2.9 |
| | Amalgamated Life & Health Ins. Co. | 2.4 |
| | American Agency Life Ins. Co. | 2.9 |
| | Am. Amicable Life Ins. Co. | 2.7 |
| | Am. Consumers Life Ins. Co. | 2.8 |
| | Am. Family Life Assurance Co. | 2.9 |
| | Am. Fidelity Life Ins. Co. | 2.9 |
| | Am. Life & Casualty Ins. Co. | 2.5 |
| | Am. Public Life Ins. Co. | 2.8 |
| | Am. Way Life Ins. Co. | 2.8 |
| | Argus Life Ins. Co. | 2.5 |
| | Assoc. Life Ins. Co. | 2.9 |
| | Atlanta Life Ins. Co. | 2.9 |
| | Atlantic Am. Life Ins. Co. | 2.3 |
| | A&P Life Ins. Co. of Am. | 2.7 |
| | Auto Owners Life Ins. Co. | 2.9 |
| | Capitol Bankers Life Ins. Co. | 2.9 |
| | Celtic Life Ins. Co. | 2.9 |
| | Centurion Life Ins. Co. | 2.9 |
| | Cherokee Nat'l Life Ins. Co. | 2.6 |
| | Chrysler Life Ins. Co. | 2.9 |
| | Citadel Life Ins. Co. | 2.8 |
| | Coastal States Life Ins. Co. | 2.9 |
| | Commonwealth Life Ins. Co. | 2.9 |
| | Commonwealth Nat'l Life Ins. Co. | 2.7 |
| | Consolidated Am. Life Ins. Co. | 2.2 |
| | Cotton States Life & Health Ins. Co. | 2.8 |
| | Dependable Life Ins. Co. | 2.7 |
| | Dixie Nat'l Life Ins. Co. | 2.9 |
| P | Equitable Life Assur. Society | 2.9 |
| | Equity Nat'l Life Ins. Co. | 2.7 |
| | Exec. Fund Life Ins. Co. | 2.8 |
| | First National Life Ins. Co. | 2.9 |
| | Founders Life Assurance Co. of Fl. | 2.7 |
| | Franklin Life Ins. Co. | 2.9 |
| | Gen. Am. Life Ins. Co. | 2.9 |
| | Ga. International Life Ins. Co. | 2.8 |
| | Ga. Life & Health Ins. Co. | 2.9 |
| | Gibraltar Life Ins. Co. of Am. | 2.7 |
| | Globe Life & Accident Ins. Co. | 2.8 |

| | | Tax Rate % |
|---|---|---|
| | Guarantee Reserve Life Ins. Co. | 2.9 |
| | Gulf Life Ins. Co. | 2.6 |
| P | Hartford Life & Accident Ins. Co. | 2.9 |
| P | Hartford Variable Annuity & Life Ins. Co. | 2.9 |
| | Imperial International Life Ins. Co. | 2.6 |
| | Independent Life & Accident Ins. Co. | 2.5 |
| | Jefferson Std. Life Ins. Co. | 2.7 |
| P | John Hancock Mutual Life Ins. Co. | 2.9 |
| | Kennesaw Life & Accident Ins. Co. | 2.7 |
| | Knickerbocker Life Ins. Co. | 2.8 |
| | Lamar Life Ins. Co. | 2.9 |
| | Life & Casualty Ins. Co. of Tenn. | 2.6 |
| | Life Ins. Co. of Georgia | 2.0 |
| | Life Ins. Co. of North America | 2.9 |
| | Lincoln American Life Ins. Co. | 2.9 |
| | Lincoln National Life Ins. Co. | 2.9 |
| | Mass. Mutual Life Ins. Co. | 2.9 |
| P | Metropolitan Life Ins. Co. | 2.9 |
| | Midwest Nat'l Life Ins. Co. of Tex. | 2.9 |
| | Montgomery Ward Life Ins. Co. | 2.9 |
| | Monumental Life Ins. Co. | 2.8 |
| P | Mutual Life Ins. Co. of N.Y. | 2.9 |
| | Nat'l Life & Accident Ins. Co. | 2.9 |
| | Nat'l Savings Life Ins. Co. | 2.9 |
| | Nat'l States Ins. Co. | 2.9 |
| P | New York Life Ins. Co. | 2.9 |
| | Pan Am Life Ins. Co. | 2.9 |
| | Paramount Life Ins. Co. | 2.0 |
| P | Paul Revere Life Ins. Co. | 2.9 |
| | Penn Mutual Life Ins. Co. | 2.9 |
| | Penn. Life Ins. Co. | 2.9 |
| | Personal Life Ins. Co. | 2.8 |
| | Pilot Life Ins. Co. | 2.8 |
| | Praetorian Mutual Life Ins. Co. | 2.9 |
| | Progressive Nat'l Life Ins. Co. | 2.8 |
| | Proprietors Life Assurance Co. | 2.8 |
| | Provident Life & Accident Ins. Co. | 2.8 |
| | Bruce Life Ins. Co. | 2.7 |
| | Pyramid Life Ins. Co. | 2.9 |
| | Shenandoah Life Ins. Co. | 2.6 |
| | Southeastern General Life Ins. Co. | 2.8 |
| | Southern Educators Life Ins. Co. | 2.8 |
| | Southern Farm Bureau Life Ins. Co. | 2.8 |
| | Southern Life Ins. Co. | 2.9 |
| | Southland Life Ins. Co. | 2.9 |
| | Springfield Life Ins. Co. | 2.9 |
| | State Farm Life Ins. Co. | 2.9 |



| | | | Tax Rate % | |
|---|---|---|---|---|
| | State Life Ins. Co. | | 2.4 | |
| | State Mutual Ins. Co. | | 2.9 | |
| | Statesman Life Ins. Co. | | 2.8 | |
| | Traveler H Assurance Co. | | 2.9 | |
| | Transamerica Occidental Life | | 2.9 | |
| | Twentieth Century Life Ins. Co. | | 2.3 | |
| | USAA Life Ins. Co. | | 2.9 | |
| | Union Central Life Ins. Co. | | 2.9 | |
| | Union Security Life Ins. Co. | | 2.0 | |
| | United Companies Life Ins. Co. | | 2.3 | |
| | United Republic Life Ins. Co. | | 2.9 | |
| | Univ. Underwriters Life Ins. Co. | | 2.7 | |
| | Variable Annuity Life Ins. Co. | | 2.8 | |
| | Volunteer State Life Ins. Co. | | 2.6 | |
| | Washington Nat'l Ins. Co. | | 2.9 | |
| | Western & Southern Life Ins. Co. | | 2.9 | |
| | World Service Life Ins. Co. | | 2.5 | |
| | Total this page | 10 | | |
| | Total | 210 | 2.75 | |
| | Plaintiffs with less than 1% of | | | |
| | Prudential Ins. Co. of America | | 3.0 | |
| | Paul Revere Variable Annuity Ins. Co. | | 1.0 | Annuities only |
| | State Mutual Life Assur. Co. of Am. | | 3.0 | |
| | Hartford Life Ins. Co. | | 3.0 | |
| | Travelers Ins. Co. | | 3.0 | |

## EXHIBIT 2

### FOREIGN LIFE INSURANCE COMPANIES CLAIMING CREDIT FOR ALABAMA INVESTMENTS FOR THE YEAR 1979

| | | Tax Rate % |
|---|---|---|
| | Aetna Life Ins. Co. | 2.9 |
| | Amalgamated Life & Health Ins. Co. | 2.4 |
| | Am. Agency Life Ins. Co. | 2.9 |
| | Am. Consumers Life Ins. Co. | 2.7 |
| | Am. Family Life Assur. Co. of Columbus | 2.8 |
| | Am. Fidelity Life Ins. Co. | 2.9 |
| | Am. Heritage Life Ins. Co. | 2.9 |
| | Am. Life & Casualty Ins. Co. | 2.0 |
| | Am. Public Life Ins. Co. | 2.8 |
| | Argus Life Insurance Co. | 2.6 |
| | Associates Life Ins. Co. | 2.9 |
| | Atlanta Life Ins. Co. | 2.9 |
| | Atlantic Am. Life Ins. Co. | 2.2 |
| | Atlantic & Pacific Life Ins. Co. of Am. | 2.7 |
| | Auto Owners Life Ins. Co. | 2.9 |
| | Resolute Life Insurance Co. | 2.8 |
| | Centurion Life Ins. Co. | 2.9 |
| | Cherokee Nat'l Life Ins. Co. | 2.5 |
| | Chrysler Life Ins. Co. | 2.9 |
| | Citadel Life Ins. Co. | 2.8 |
| | Coastal States Life Ins. Co. | 2.9 |
| | Commonwealth Life Ins. Co. | 2.8 |
| | Commonwealth Nat'l Life Ins. Co. | 2.7 |
| | Consolidated Am. Life Ins. Co. | 2.8 |
| | Constitution Life Ins. Co. | 2.8 |
| | Continental Service Life & Health Ins. Co. | 2.9 |
| | Dependable Life Ins. Co. | 2.9 |
| | Dixie Nat'l Life Ins. Co. | 2.9 |
| P | Equitable Life Assur. Society of U.S. | 2.9 |
| | Equity Nat'l Life Ins. Co. | 2.7 |
| | Fidelity Interstate Life Ins. Co. | 2.9 |
| | First Nat'l Life Ins. Co. of Am. | 2.0 |
| | Founders Life Assurance Co. of Fl. | 2.7 |
| | Franklin Life Insurance Co. | 2.9 |
| | Geneva Life Ins. Co. | 2.9 |
| | Ga. International Life Ins. Co. | 2.9 |
| | Ga. Life & Health Ins. Co. | 2.0 |
| | Domestic [Gibraltar Life Ins. Co. of Am.] | 2.7 |
| | Gulf Life Ins. Co. | 2.8 |
| P | Hartford Life & Accident Ins. Co. | 2.9 |
| P | Hartford Variable Annuity Ins. Co. | 2.9 |
| | Imperial International Life Ins. Co. | 2.6 |



| | | Tax Rate % |
|---|---|---|
| | Independent Life & Accident Ins. Co. | 2.5 |
| | Investors Nat'l Life Ins. Co. | 2.4 |
| | Jefferson Standard Life Ins. Co. | 2.7 |
| P | John Hancock Mutual Life Ins. Co. | 2.9 |
| | Kennesaw Life & Accident Ins. Co. | 2.3 |
| | Long Life Ins. Co. of South Carolina | 2.0 |
| | Labor Life Insurance Co. | 2.9 |
| | Life & Casualty Ins. Co. of Tenn. | 2.8 |
| | Life Ins. Co. of Cincinnati | 2.9 |
| | Life Ins. Co. of Georgia | 2.0 |
| | Life Ins. Co. of North America | 2.8 |
| | Lincoln Am. Life Ins. Co. | 2.9 |
| | Lincoln Nat'l Life Ins. Co. | 2.9 |
| | MIC Life Ins. Corp. | 2.9 |
| | Mass. Mutual Life Ins. Co. | 2.9 |
| | Mayflower Nat'l Life Ins. Co. | 2.8 |
| P | Metropolitan Life Ins. Co. | 2.9 |
| | Midland Nat'l Life Ins. Co. | 2.9 |
| | Mid West Nat'l Life Ins. Co. of Tex. | 2.9 |
| | Monumental Life Ins. Co. | 2.8 |
| P | Mutual Life Ins. Co. of N.Y. | 2.9 |
| | Nat'l Life & Accident Ins. Co. | 2.9 |
| | Nat'l Life Ins. Co. | 2.9 |
| | Nat'l Producers Life Ins. Co. | 2.9 |
| | Nat'l Savings Life Ins. Co. | 2.9 |
| | Nat'l States Ins. Co. | 2.9 |
| P | New York Life Ins. Co. | 2.9 |
| | Occidental Life Ins. Co. of Cal. | 2.9 |
| | Orange State Life Ins. Co. | 2.8 |
| | PanAm Life Ins. Co. | 2.9 |
| | Paramount Life Ins. Co. | 2.0 |
| P | Paul Revere Life Ins. Co. | 2.9 |
| | Penn Mutual Life Ins. Co. | 2.9 |
| | Pilot Life Ins. Co. | 2.8 |
| | Pilgrim Health & Life Ins. Co. | 2.5 |
| | Presbyterian Mutual Life Ins. Co. | 2.9 |
| | Preferred Risk Life Ins. Co. | 2.9 |
| | Progressive Nat'l Life Ins. Co. | 2.8 |
| | Provident Life & Accident Ins. Co. | 2.8 |
| | Provo Life Ins. Co. | 2.8 |
| | Safeco Life Ins. Co. | 2.9 |
| | Shenandoah Life Ins. Co. | 2.6 |
| | Southeastern Gen. Life Ins. Co. | 2.7 |
| | Southern Farm Bureau Life Ins. Co. | 2.8 |
| | Southern Educators Life Ins. Co. | 2.8 |
| | Southern Life Ins. Co. | 2.9 |
| | Southland Life Ins. Co. | 2.9 |

| | | Tax Rate % |
|---|---|---|
| | Springfield Life Ins. Co. | 2.9 |
| | State Farm Life Ins. Co. | 2.9 |
| | State Life Ins. Co. | 2.4 |
| | State Mutual Ins. Co. | 2.5 |
| | Statesman Life Ins. Co. | 1.8 |
| | Transam. Life Ins. & Annuity Co. | 2.9 |
| | USAA Life Ins. Co. | 2.9 |
| | Union Central Life Ins. Co. | 2.9 |
| | Union Labor Life Ins. Co. | 2.9 |
| | Union Security Life Ins. Co. | 2.8 |
| | United Companies Life Ins. Co. | 2.2 |
| | United Families Life Ins. Co. | 2.9 |
| | United Republic Life Ins. Co. | 2.9 |
| | Universal Underwriters Life Ins. Co. | 2.7 |
| | Valley Forge Life Ins. Co. | 2.9 |
| | Volunteer State Life Ins. Co. | 2.6 |
| | Washington Nat'l Ins. Co. | 2.9 |
| | Western & Southern Life Ins. Co. | 2.9 |
| | World Service Life Ins. Co. | 2.5 |
| | **Total** | |
| | Plaintiffs with less than 1% of | |
| | Prudential Ins. Co. of America | 3.0 |
| | Paul Revere Variable Annuity Ins. Co. | 3.0 |
| | State Mutual Life Assur. Co. of Am. | 3.0 |
| * | Travelers Ins. Co. (Life) | 3.0 |
| | Hartford Life Ins. Co. | 3.0 |



## EXHIBIT 3

### FOREIGN PROPERTY & CASUALTY COMPANIES CLAIMING CREDIT FOR ALABAMA INVESTMENTS FOR THE YEAR 1980

| | | Tax Rate % |
|---|---|---|
| | Aetna Casualty & Surety | 3.0 |
| | Aetna Insurance Co. | 3.0 |
| | Allstate Indemnity Co. | 3.0 |
| | Allstate Insurance Co. | 3.0 |
| | Am. Bankers Ins. Co. of Florida | 3.0 |
| | Am. Cas. Co. of Reading Penn. | 3.0 |
| | Am. Cr. Indemnity Co. | 3.0 |
| | Am. Economy Insurance Co. | 2.7 |
| | Am. Family Home Ins. Co. | 3.0 |
| | Am. Fire & Casualty Co. | 3.0 |
| | Am. Interstate Ins. Co. of Ga. | 3.0 |
| | Am. Mortgage Ins. Co. | 2.7 |
| | Am. Mutual Fire Ins. Co. | 2.7 |
| | Am. Nat'l Property & Casualty | 3.0 |
| | Am. Security Ins. Co. | 3.2 |
| | Am. States Ins. Co. | 3.0 |
| | Assoc. General Ins. Co. | 3.0 |
| | Atlanta International Ins. Co. | 3.0 |
| | Atlantic Mutual Fire Ins. Co. | 2.7 |
| NA | Auto Owners Ins. Co. | 3.0 |
| | Bituminous Casualty Corp. | 3.0 |
| | Bituminous Fire & Marine Ins. Co. | 3.0 |
| | CIM Ins. Corp. | 3.0 |
| | Calvert Fire Ins. Co. | 3.3 |
| | Canal Ins. Co. | 3.3 |
| | Carolina Casualty Ins. Co. | 3.3 |
| | Casualty Reciprocal Exchange | 2.7 |
| | Centurion Casualty Co. | 3.0 |
| | Charter Am. Ins. Co. | 3.0 |
| | Cincinnati Ins. Co. | 3.0 |
| | Colonia Ins. Co. | 3.0 |
| * | Consolidated Am. Ins. Co. | 3.2 |
| | Cotton States Mutual Ins. Co. | 2.1 |
| | Covington Mutual Ins. Co. | 3.6 |
| | Criterion Ins. Co. | 3.0 |
| | Dependable Ins. Co. | 3.6 |
| | Early Am. Ins. Co. | 3.0 |
| | Economy Fire & Casualty Co. | 3.0 |
| | Employers Casualty Co. | 3.0 |
| | Employers Nat'l Ins. Co. | 3.6 |
| | Excalibur Insurance Co. | 2.7 |

| | | Tax Rate % |
|---|---|---|
| | Fidelity & Guaranty Ins. Underwriters | 3.6 |
| NA | Fidelity & Casualty Co. of N.Y. | 3.0 |
| | Fidelity Southern Ins. Co. | 3.5 |
| | First Financial Ins. Co. | 3.9 |
| | First Nat'l Ins. Co. of America | 3.8 |
| | Gen. Reinsurance Corp. | 3.8 |
| | Georgia Casualty & Surety Co. | 3.9 |
| | Govt. Employees Ins. Co. | 3.9 |
| | Great American Ins. Co. | 3.5 |
| P | Hanover Ins. Co. | 3.9 |
| P | Hartford Casualty Ins. Co. | 3.9 |
| | Highlands Ins. Co. | 3.8 |
| | Highlands Underwriters Ins. Co. | 3.4 |
| | Home Indemnity Co. | 3.9 |
| | Independent Fire Ins. Co. | 3.7 |
| | Independent Reciprocal Exchange | 3.8 |
| P | Industrial Indemnity Co. | 3.9 |
| | Integon Gen. Ins. Corp. | 3.8 |
| | Integon Indemnity Corp. | 3.9 |
| P | International Ins. Co. | 3.8 |
| | Interstate Fire Ins. Co. | 3.2 |
| | Jefferson Pilot Fire & Casualty Co. | 3.8 |
| | Liberty Mutual Ins. Co. | 3.9 |
| | Lloyds New York | 3.9 |
| | National Indemnity of Am. | 3.9 |
| | Merchants Property Ins. Co. of Ind. | 3.3 |
| | Michigan Mutual Ins. Co. | 3.9 |
| | Morrison Assurance Co. | 3.9 |
| | Motors Ins. Corp. | 3.9 |
| | National Casualty Co. | 3.9 |
| | National Indemnity Co. | 3.9 |
| | National Surety Corp. | 3.9 |
| P | N.Y. Underwriters Ins. Co. | 3.9 |
| | Newark Ins. Co. | 3.7 |
| P | North River Ins. Co. | 3.8 |
| | Northbrook Nat'l Ins. Co. | 3.9 |
| | Northbrook Property & Cas. Ins. Co. | 3.5 |
| | Northern Ins. Co. of N.Y. | 3.8 |
| | Northland Ins. Co. | 3.9 |
| | Ohio Security Ins. Co. | 3.9 |
| | Old Republic Ins. Co. | 3.8 |
| | PMT Mortgage Ins. Co. | 3.8 |
| | Preferred Risk Mutual Ins. Co. | 3.9 |
| | Provident Gen. Ins. Co. | 3.7 |
| | Puritan Ins. Co. | 3.9 |
| | Queen City Indemnity Co. | 3.9 |
| | Ranger Ins. Co. | 3.8 |



| | | Tax Rate % |
|---|---|---|
| | Republic Mortgage Ins. Co. | 3.6 |
| | SAFECO Ins. Co. of Am. | 3.9 |
| NA | St. Paul Fire & Marine Ins. Co. | 3.7 |
| | St. Paul Mercury Ins. Co. | 3.9 |
| | St. Paul Ins. Co. of Illinois | 3.0 |
| | Seaboard Surety Co. | 3.8 |
| | Security Casualty Co. | 3.8 |
| | Shield Ins. Co. | 3.0 |
| | South Carolina Ins. Co. | 3.5 |
| | Southeastern Fidelity Ins. Co. | 3.8 |
| • | Southeastern Fire Ins. Co. | 3.9 |
| | Southern Trust Ins. Co. | 3.5 |
| | Standard Fire Ins. Co. | 3.9 |
| | Standard Guaranty Ins. Co. | 3.3 |
| NA | State Farm Fire & Casualty Co. | 3.9 |
| NA | State Farm Mutual Auto Ins. Co. | 3.9 |
| | Thomas Jefferson Ins. Co. | 3.7 |
| | Ticor Mortgage Ins. Co. | 3.9 |
| | Olympic Ins. Co. | 3.9 |
| P | Twin City Fire Ins. Co. | 3.8 |
| | Union National Fire Ins. Co. | 3.9 |
| | United Services Auto Assoc. | 3.9 |
| P | U.S. Fire Ins. Co. | 3.9 |
| | Vanguard Ins. Co. | 3.8 |
| | Wausau Underwriters Ins. Co. | 3.9 |
| | Westchester Fire Ins. Co. | 3.8 |
| | Western Employers Ins. Co. | 3.8 |
| | Yosemite Ins. Co. | 3.9 |
| | Colonial Penn Franklin Ins. Co. | 3.1 |
| | **Total this page** | |
| | Plaintiffs with less than 1% of Prudential Property & Casualty Ins. | 4.0 |
| | Travelers Ins. Co. (Accident) | 4.0 |
| | Massachusetts Bay Ins. Co. | 4.0 |
| | Hartford Fire Ins. Co. | 4.0 |
| | Hartford Accident & Indemnity Co. | 4.0 |

## EXHIBIT 4

### FOREIGN PROPERTY & CASUALTY COMPANIES CLAIMING CREDIT FOR ALABAMA INVESTMENTS FOR THE YEAR 1979

| | | Tax Rate % |
|---|---|---|
| | Aetna Casualty & Surety Co. | 3.9 |
| | Aetna Ins. Co. | 3.9 |
| | Allstate Indemnity Co. | 3.8 |
| | Allstate Ins. Co. | 3.8 |
| | Am. Bankers Ins. Co. of Fl. | 3.8 |
| | Am. Credit Indemnity Co. | 3.8 |
| | Am. Economy Ins. Co. | 3.7 |
| | Am. Family Home Ins. Co. | 3.8 |
| • | Am. Fire & Casualty Co. | 3.9 |
| | Am. Interstate Ins. Co. of Ga. | 3.0 |
| | Am. Mortgage Ins. Co. | 3.8 |
| | Am. Mutual Fire Ins. Co. | 3.8 |
| | Am. National Property & Casualty | 3.9 |
| | Am. Security Ins. Co. | 3.0 |
| • | Am. Southern Ins. Co. | 3.9 |
| | Am. States Ins. Co. | 3.7 |
| | Assoc. Gen. Ins. Co. | 3.9 |
| | Atlantic Mutual Fire Ins. Co. | 3.7 |
| | Auto Owners Ins. Co. | 3.9 |
| | Bituminous Casualty Corp. | 3.9 |
| | Bituminous Fire & Marine Ins. Co. | 3.8 |
| | CIM Ins. Corp. | 3.8 |
| | Calvert Fire Ins. Co. | 3.9 |
| | Canal Insurance Co. | 3.6 |
| | Carolina Casualty Ins. Co. | 3.4 |
| | Cavalier Ins. Corp. | 3.9 |
| | Charter Am. Ins. Co. | 3.9 |
| | Cherokee Ins. Co. | 3.7 |
| | Cincinnati Ins. Co. | 3.9 |
| | Colonial Penn Franklin Ins. Co. | 3.0 |
| | Columbia A&H Ins. Co. | 3.9 |
| | Consolidated Am. Ins. Co. | 3.6 |
| | Cosmopolitan Mutual Ins. Co. | 3.8 |
| | Cotton Belt Ins. Co. | 3.1 |
| | Cotton States Mutual Ins. Co. | 3.0 |
| | Covington Mutual Ins. Co. | 3.5 |
| | Criterion Ins. Co. | 3.8 |
| • | Dependable Ins. Co. | 3.6 |
| | Electric Mutual Liability Ins. Co. | 3.9 |
| | Empire Fire & Marine Ins. Co. | 3.9 |
| | Employers Casualty Co. | 3.9 |

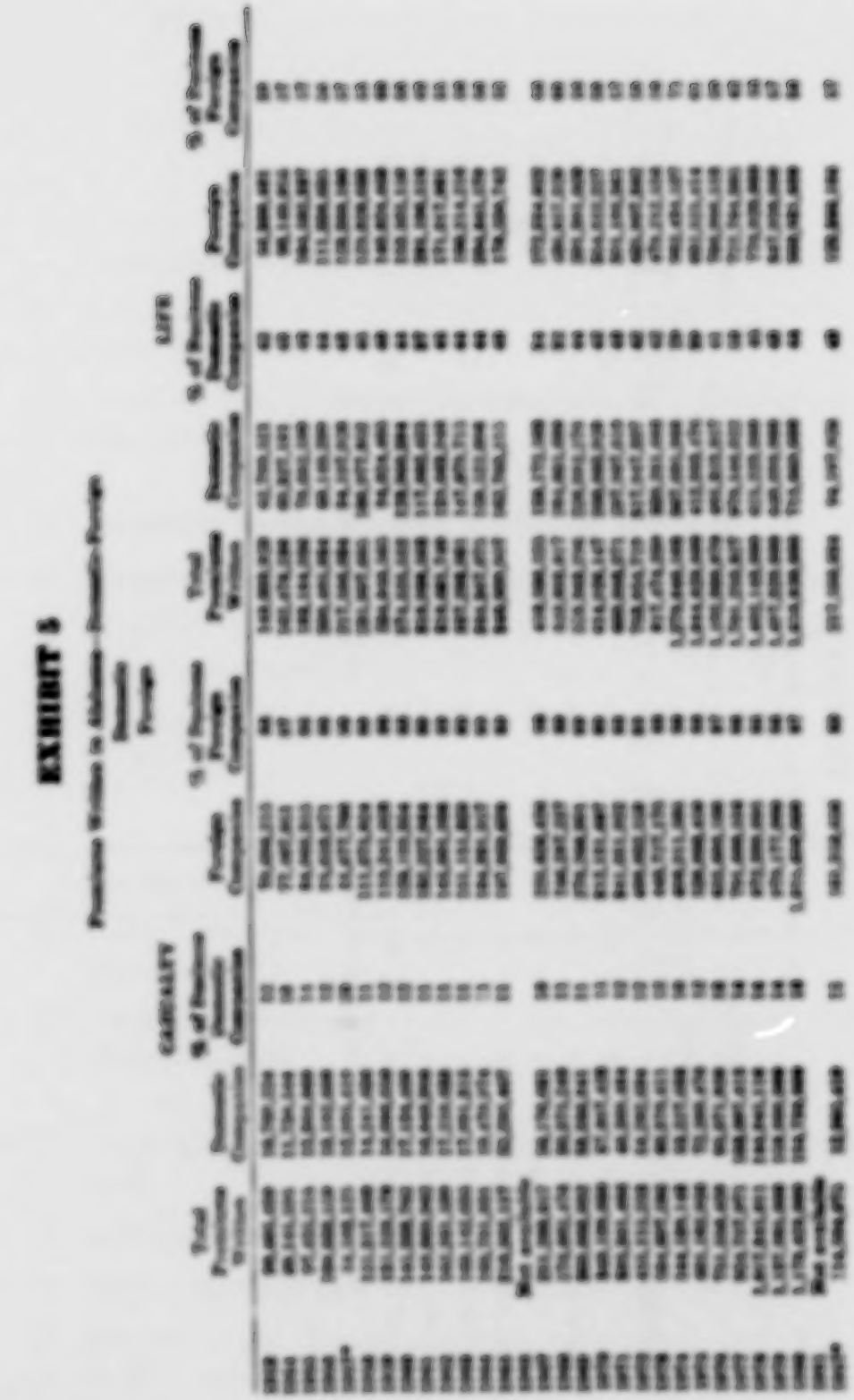


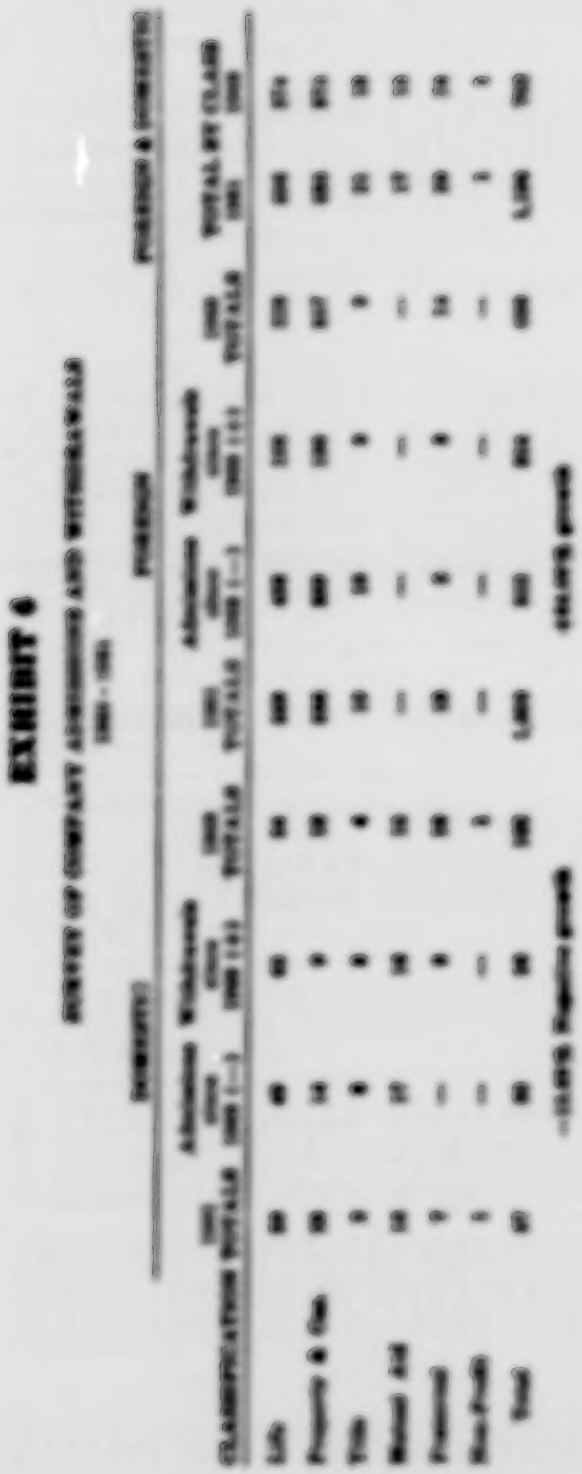
| | | Tax Rate % |
|---|---|---|
| | Employers Nat'l Ins. Co. | 3.5 |
| | Excalibur Ins. Co. | 3.6 |
| | Fidelity & Casualty Co. of N.Y. | 3.0 |
| | Fidelity & Guaranty Ins. Underwriters | 3.4 |
| | Fidelity Southern Ins. Co. | 3.5 |
| | First Financial Ins. Co. | 3.9 |
| | First Nat'l Ins. Co. of Am. | 3.8 |
| | Gen. Reinsurance Corp. | 3.7 |
| • | Georgia Casualty & Surety Co. | 3.9 |
| | Govt. Employees Ins. Co. | 3.9 |
| | Great Am. Ins. Co. | 3.4 |
| P | Hanover Ins. Co. | 3.9 |
| P | Hartford Accident & Indemnity Co. | 3.9 |
| P | Hartford Casualty Ins. Co. | 3.9 |
| | Highlands Ins. Co. | 3.8 |
| | Highlands Underwriters Ins. Co. | 3.6 |
| | Home Indemnity Co. | 3.9 |
| | Independent Fire Ins. Co. | 3.7 |
| P | Industrial Indemnity Co. | 3.9 |
| | Integon Gen. Ins. Co. | 3.8 |
| | Integon Indemnity Corp. | 3.9 |
| P | International Ins. Co. | 3.8 |
| | Interstate Fire Ins. Co. | 3.0 |
| | Jefferson Pilot Fire & Cas. Co. | 3.8 |
| | John Deere Ins. Co. | 3.9 |
| | Liberty Mutual Fire Ins. Co. | 3.9 |
| | Liberty Mutual Ins. Co. | 3.9 |
| | Lloyds New York | 3.8 |
| | Mead Reinsurance Corp. | 3.9 |
| | Medical Indemnity Co. of Am. | 2.9 |
| | Merchants Property Ins. Co. of Ind. | 3.2 |
| | Mission Ins. Co. | 3.9 |
| | Morrison Assurance Co. | 3.0 |
| | Motors Ins. Corp. | 3.9 |
| | National Am. Ins. Co. | 3.9 |
| | National Casualty Co. | 3.8 |
| | National Indemnity Co. | 3.9 |
| | National Surety Corp. | 3.9 |
| P | New York Underwriters Ins. Co. | 3.9 |
| | Newark Ins. Co. | 3.7 |
| P | North River Ins. Co. | 3.8 |
| | Northbrook Property & Casualty Ins. Co. | 3.4 |
| | Northern Ins. Co. of New York | 3.8 |
| | Northland Ins. Co. | 3.7 |
| | Old Republic Ins. Co. | 3.8 |
| | Olympic Ins. Co. | 3.9 |
| | PMT Mortgage Ins. Co. | 3.8 |

| | | Tax Rate % |
|---|---|---|
| | Preferred Risk Mutual Ins. Co. | 3.9 |
| • | Progressive Casualty Ins. Co. | 3.9 |
| | Provident Gen. Ins. Co. | 3.6 |
| | Puritan Ins. Co. | 3.9 |
| | Queen City Indemnity Co. | 3.9 |
| | Ranger Ins. Co. | 3.8 |
| | Republic Mortgage Ins. Co. | 3.6 |
| | St. Paul Mercury Ins. Co. | 3.9 |
| | St. Paul Fire & Marine Ins. Co. | 3.7 |
| | Security Mutual Casualty Co. | 3.8 |
| | Shield Insurance Co. | 3.0 |
| | South Carolina Ins. Co. | 3.5 |
| | Southeastern Fidelity Ins. Co. | 3.6 |
| • | Southeastern Fire Ins. Co. | 3.8 |
| | Southern Trust Ins. Co. | 3.4 |
| | Standard Fire Ins. Co. | 3.9 |
| | Standard Guaranty Ins. Co. | 3.1 |
| | State Farm Fire & Casualty Co. | 3.9 |
| | State Farm Mutual Auto Ins. Co. | 3.9 |
| | Timm Mortgage Ins. Co. | 3.9 |
| | Transit Casualty Co. | 3.9 |
| P | Twin City Fire Ins. Co. | 3.8 |
| • | Union Nat'l Fire Ins. Co. | 3.9 |
| P | United States Fire Ins. Co. | 3.9 |
| | Vanguard Ins. Co. | 3.8 |
| | Westchester Fire Ins. Co. | 3.8 |
| | American Continental Ins. Co. | 3.8 |
| | C H General Ins. Co. | 3.9 |
| | Casualty Reciprocal Exchange | 3.7 |
| | Independent Reciprocal Exc. | 3.8 |
| | United Services Auto. Assn. | 3.9 |
| | Plaintiffs with less than 1% of Prudential Property & Casualty Ins. | 4.0 |
| | Travelers Ins. Co. (Accident) | 4.0 |
| | Mass. Bay Ins. Co. | 4.0 |
| | Hartford Fire Ins. Co. | 4.0 |



EXHIBIT







## DOMESTIC COMPANY CESSATIONS (ACQUISITIONS, MERGERS, RECEIVERSHIPS, ETC.)

*1981*

1. Lincoln Industrial, Birmingham, AL dissolved by Court Order
2. New Liberty Life, Birmingham, AL voluntarily withdrew (Surrendered)
3. Southern Life & Health, Birmingham, AL merged into Del. Corp.

*1980*

1. American Amicable—Redomesticated to Texas
2. American Investors merged into American Educators
3. Imperial Life Insurance Corp. of Alabama merged into Loyal American
4. Commercial Reserve Life Dissolved

*1979*

1. Gulf American Fire & Casualty Co. merged into American States Ins. Co.
2. United Service Insurance Company—Reinsured by Mutual Savings Life Ins. Co. and Dissolved
3. Investors Preferred Life—Dissolved—Reinsured by Protective Life

*1978*

1. Dixie Auto Ins. Co. merged into a non-admitted company
2. Life Insurance Co. of America—Receivership
3. Peoples Savings Life Ins. Co.—Certificate revoked
4. Education and Retirement Life—converted from M.A. to Full Life (Court Order)

*1977*

1. Booker T. Washington Fire Ins. Co.—Dissolved
2. Citizens Life Ins. Co. voluntarily withdrew from business as Mutual Aid (No business; no reserves)
3. New ATL Life Ins. Co. merged into American Tidelands

*1976*

1. American Allied—Redomesticated to Iowa as States Life Ins. Co.
2. Grand Lodge, Knights of Pythias—Terminated (Fraternal)
3. Vanguard Security Life—Receivership

*1975*

1. All States Life—Certificate expired
2. Empire Life Ins. Co. of America—Certificate expired
3. Southern Benefit Life (Mutual Aid) voluntarily withdrew
4. United Trust Life—Certificate revoked
5. Modern Home Life (receivership 1974) business reinsured by Vulcan

*1974*

1. Druid Life Insurance Company voluntarily withdrew
2. Gateway Insurance Company voluntarily withdrew
3. Title Security Company voluntarily ceased operation
4. Trustee Life suspended (placed in receivership 1975)

*1973*

1. Family Trust Life (Mutual Aid) did not renew license



2. Federated Guaranty Life merged into Cotton States Life, changed name back to Federated Guaranty Life
3. International Casualty Company merged into Summit Fidelity & Surety (Iowa)
4. Union Savings Life did not renew license

*1972*

(Additions)

1. Alabama Rural Fire Ins. Co. licensed for Property 10/10/72
2. American Reserve Life Ins. Co. relicensed for Life 1/1/72
3. Booker T. Washington Fire Ins. Co., Birmingham, licensed for Property 8/18/72

(Withdrawals)

1. American Association Life Ins. Co. business reinsured, Certificate surrendered 9/20/72
2. American Professional Life Ins. Co.—Receivership 6/5/72
3. Empire Life Ins. Co. of America—Receivership 6/29/72
4. National Investors Life Ins. Co. of Ala'ama merged into National Investors Life Insurance Company, Little Rock, Arkansas 10/31/72
5. United Trust Life Ins. Co. of Opp (formerly Federated Trust Life) merged into Physicians and Educators Life Ins. Co. 12/31/72 & name changed to United Trust Life Ins. Co.
6. Southern Standard Life Ins. Co., Montgomery, AL business reinsured by Coastal States Life & Southern Standard dissolved December, 1972
7. Great United Life reinsured in Mutual Savings Life (dissolved 8/26/70)

*1971*

(Additions)

1. Federated Guaranty Life Ins. Co.—Life 10/29/71
2. Liberty National Fire Ins. Co.—Fire 9/7/71
3. Mutual Savings Fire Ins. Co.—Fire 9/21/71

(Withdrawals)

1. Education & Retirement Life Ins. Co.—placed in receivership 7/22/71
2. Paramount Life Ins. Co. of Ala. merged into Paramount Life Ins. Co., Little Rock, Ark. 6/30/71
3. Southeastern Title Ins. Co., Birmingham withdrew effective 11/30/71—dissolved
4. Union Savings Life Ins. Co., Mobile—Certificate of Authority revoked
5. Home Mutual Aid Society, Talladega (fraternal) did not renew license 12/31/71
6. Alliance Ins. Co., Dothan—placed in receivership 12/14/71 (Comments appear in 1973 A/R covering business of 1972. Adjusted to show correct date

*1970*

(Receiverships)

1. Alabama National Life Insurance Company
2. Alliance Insurance Company (Returned to stockholders)
3. Old National Life Insurance Company
4. Standard Union Life Insurance Company

(Mergers)

1. Southern Guardian Life Insurance Co. into Southern Heritage Life Insurance Co.



*1969*

(Receiverships)

1. Alliance Insurance Company
2. National Capital Life Insurance Company

(Mergers)

1. Commercial Security Ins. Co. merged into Commercial Assurance Co. of America
2. United Security merged into Public National Life Insurance Company

(Withdrew)

1. ALICA—10/3/69

*1968*

(Receiverships)

1. First American Life Insurance Company 3/15/68

(Mergers)

1. Guaranty Savings Life Ins. Co.—Dissolved 12/31/68
2. Dependable Life Ins. Co. into State Security Life, Indiana

*1967*

(Conversions)

1. Security Fire Life Ins. Co. converted from Mutual Aid to Legal Reserve 5/10/67

*1966*

(Mergers)

1. Equity Life Ins. Co. merged into Founders Life Assur. Co. of Fla. 3/31/66
2. Bankers F & M Ins. Co. converted to Life 1/31/66

*1963*

1. Bankers Credit Life converted from Mutual Aid to Legal Reserve Life (—MA +L)
2. Reliance Life Insurance Co. merged into National Western Life
3. Service Insurance Co.—Reinsured business and was liquidated
4. Investors Life Ins. Co.—Converted from Mutual Aid to Legal Reserve Life (—MA +L)
5. Universal Southern Life merged into Insurance Capital, Inc.

*1964*

1. Capital Fire and Cas. reinsured into Stonewall and liquidated
2. Garde Mutual Ins. Co.—not renewed
3. Royal Family Ins. converted from Mutual Aid to Legal Reserve Life (—MA +L)
4. Warrior Life Ins. Co.—not relicensed

*1965*

1. Emergency Aid Ins. Co. merged into United Security Life
2. Modern Home Title converted to Modern Home F & C (+F&C —Title)
3. National Union Life merged into National Empire Life
4. Old American Life & Cas. merged into Alliance Ins. Co.
5. Pioneer Home Owners Life merged into American Life Ins.



*1962*

See copy of P. 5 attached. [J.A. 420-23].

*1961*

1. Jefferson Davis Life converted to Mutual Aid Assn. (+MA —Life)
2. Mercantile Life merged into National Security Ins.
3. Title Guarantee & Trust—liquidated

*1960*

1. Farmers National Life merged into Security Savings Life
2. Memorial Service Ins. Co.—dissolved
3. Muscle Shoals Life Ins. Co. merged into Kentucky Central Life & Accident
4. Southern Burial Assn. merged into United Security Life
5. Universal Savings Life merged into United Security Life

*1962*

(Alabama companies italicized)

**WITHDRAWALS, MERGERS, SUSPENSIONS AND CHANGES OF NAME OF COMPANIES:**

American Federal Life Ins. Co., merged into Southeastern Life at which time the name of Southeastern changed to Southeastern American Life, 12-31-62

American General Life Ins. Co., withdrew, 12-31-62

American Health Ins. Corp., changed to Amhealth Ins. Co., then was assumed by American Health & Life, 8-21-62

*Atlantic National Life Ins. Co.*, merged into Universal American Life who changed name to Atlantic American Life, 8-10-62

*Birmingham Fire & Casualty Co.*, merged into St. Paul Fire & Marine, 1-1-62

Carriers Insurance Exchange, dropped, 10-1-62

Cavalier Life Ins. Company, changed to American Health & Life, 8-9-62

Central Casualty Company, liquidated, 8-1-62

*Citizens Life Ins. Company, dissolved*, 12-31-62

Commonwealth Ins. Co. of N.Y., merged into Mercantile Ins. Co. of America, 12-31-62

Dubuque Fire & Marine Ins. Co., changed name to Bankers Multiple Line, 7-10-62

Florida Home Ins. Company, merged into Guaranty Security Ins. Co., 12-31-62

Founders Ins. Company, merged into Security Ins. Co. of New Haven, 12-31-62



Globe & Republic Ins. Co. of America, merged into American Equitable Assurance Company of New York, 12-31-62

*Globe Life Ins. Co. of Alabama*, purchased by United Security Life, 8-3-62, then merged into Royal Family, 10-4-62

Great Southern Ins. Company, changed name to Southern Heritage Life, 8-6-62

*Gulf States Life Ins. Co.*, merged into Kentucky Central Life and Accident, 9-29-62

Gulf States Mutual Fire Ins. Co., changed to Home Service Mutual, 6-11-62

*Hometrust Life Ins. Co.*, placed in receivership 10-8-62

*Jefferson Davis Life Ins. Co.*, merged into Royal Family, 10-4-62

*Jefferson Life and Casualty Co.*, merged into Union Bankers, 5-15-62

Kennesaw Life & Accident Ins. Co., merged with National Executive Life Ins. Co. and then name changed to Kennesaw Life & Accident Ins. Co., 12-20-62

Knights Life Ins. Company, changed name to American General Life Ins. Co. of Delaware, 12-3-62

Mount Joy Mutual Ins. Company, withdrew, 12-31-62

Mutual Benefit Health and Accident Association, changed to Mutual of Omaha, 2-10-62

Mutual Ins. Co. of Pennsylvania, withdrew, 12-31-62

National Council of American Mechanics, withdrew, 12-31-62

*National Selective Life Ins. Co.*, merged into United Security Life, 5-17-62

Norwich Union Fire Ins. Society, Ltd., reinsured by Niagara Fire Ins. Co. but will maintain license status, 12-31-62

Ocean Accident and Guarantee Corp., merged into Columbia Casualty Co., 12-31-62

Pacific National Fire Ins. Co., changed to Pacific National Ins. Co., 1-2-62

Pioneer Life and Casualty Co., changed to Pioneer Home Owners Life, 1-1-62

Preferred Ins. Company, license suspended, 8-8-62

*Preferred Life Assurance Society*, changed from a Fraternal organization to a Life company, Preferred Life Ins. Co., 11-16-62

Prudence Life Ins. Co., changed to Prudence Mutual Casualty, 12-26-62

Scottish Union & National Ins. Co., reinsured by Niagara Fire Ins. Co. but will maintain license status, 12-31-62

Security Life & Accident Ins. Co., changed to Security Life Ins. Co. of America, 4-30-62

*Security Mutual Fire Ins. Co.*, reinsured in General Security, 1-2-62

*Security Savings Life Ins. Co.*, merged into United Security Life, 6-8-62

South States Life Ins. Co., dropped, 11-13-62

*Southern Memorial Life Ins. Co., reinsured* in Vulcan Life & Accident, 5-10-62

Southern National Ins. Co., merged into United Ins. Co. of America, 3-5-62

Superior Risk Ins. Co., dropped, 1-1-62

Textile Ins. Company, merged with Cosmopolitan Ins. Co. which is not licensed in Alabama, 6-1-62



*Trans-Gulf Insurance Co.*, changed name to Southern Heritage Life Ins. Co., licensed as stock life company, 8-6-62

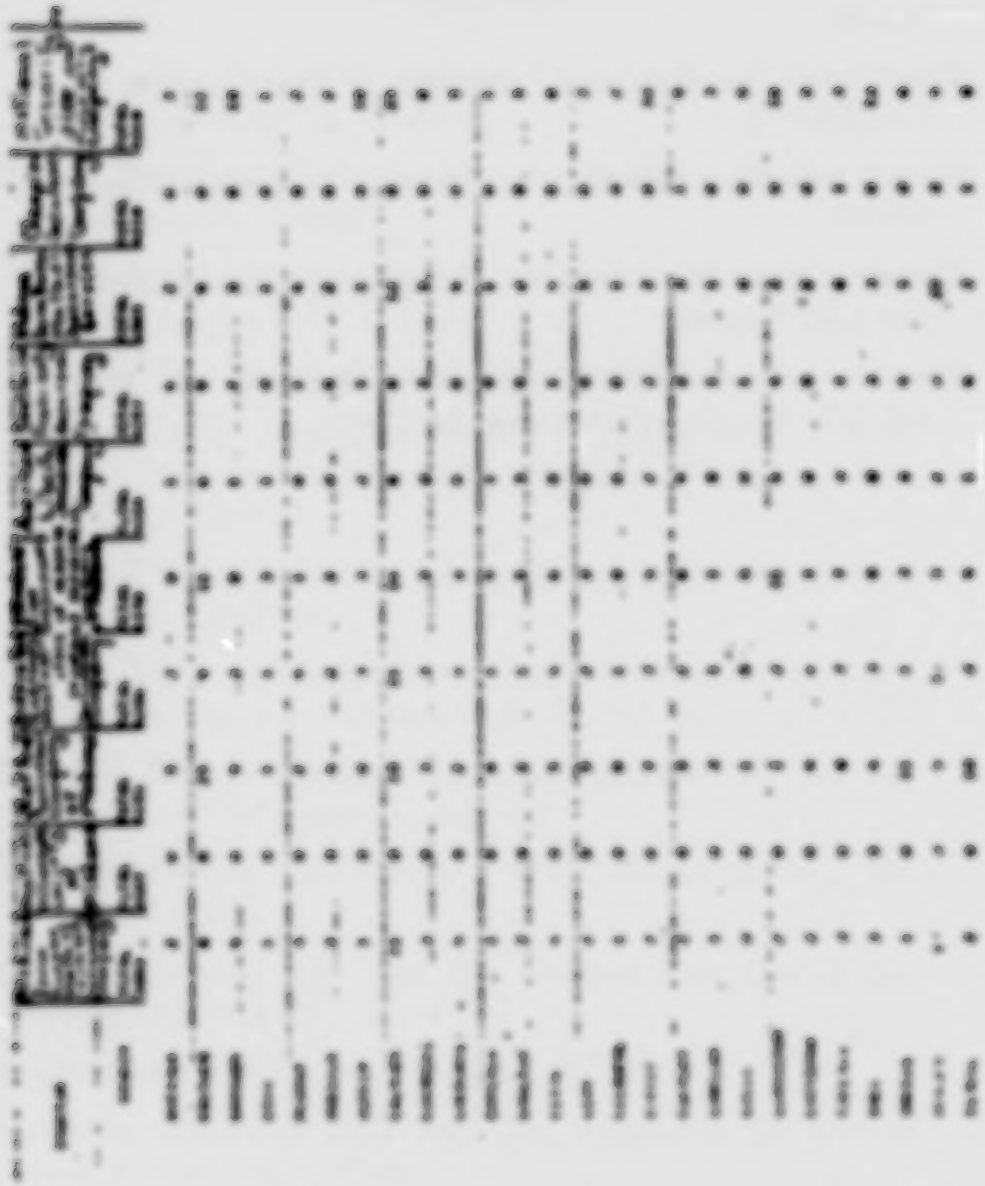
Trust Life Ins. Company, changed to Trustee Life Ins. Co., 8-21-62

United American Life Ins. Co., changed to United Family, 6-7-62

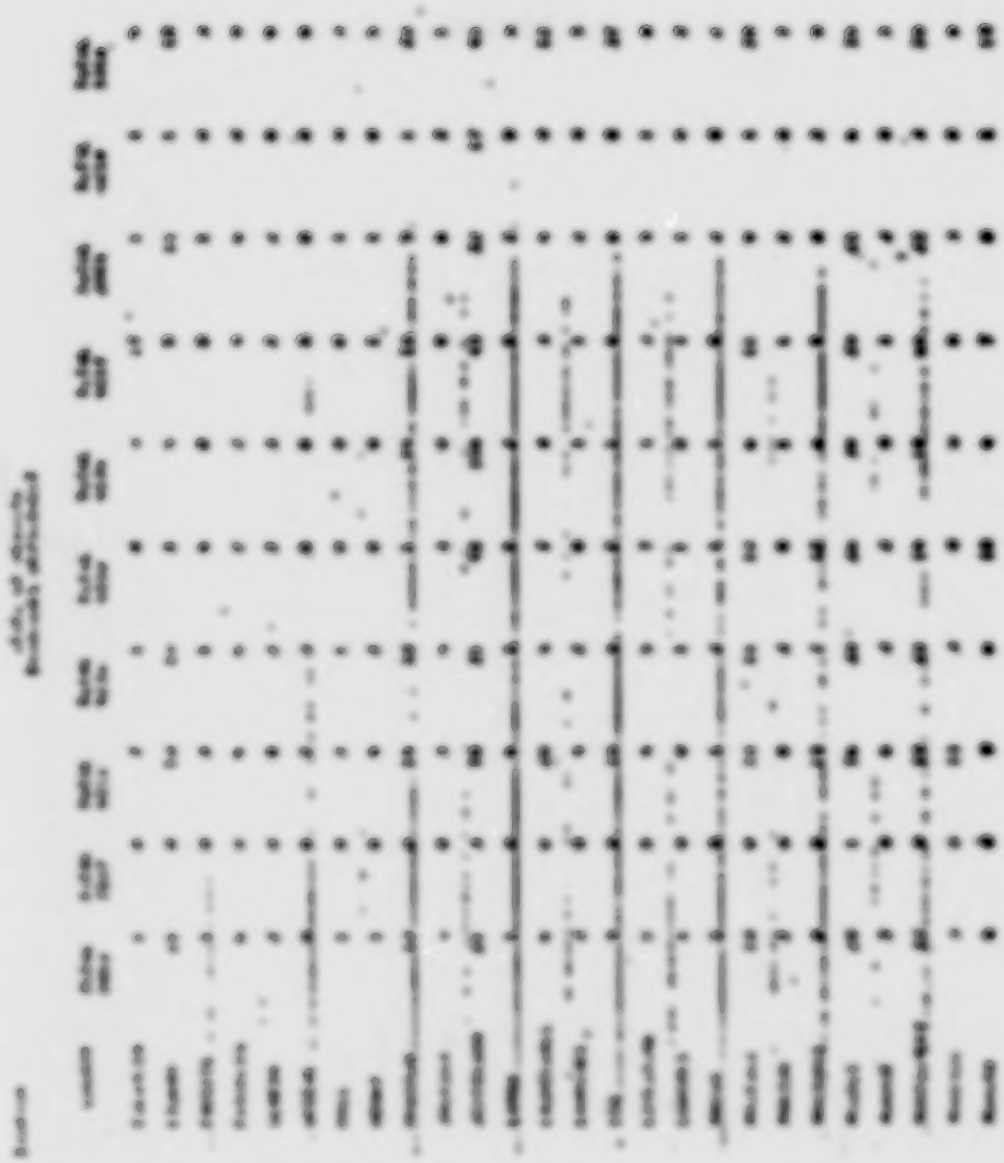
Universal Life Ins. Company, changed to Atlantic American Life, 8-10-62

Western Life Ins. Co. of Minnesota, merged into Western Life Ins. Co. of Montana, 12-31-62

EXHIBIT 7







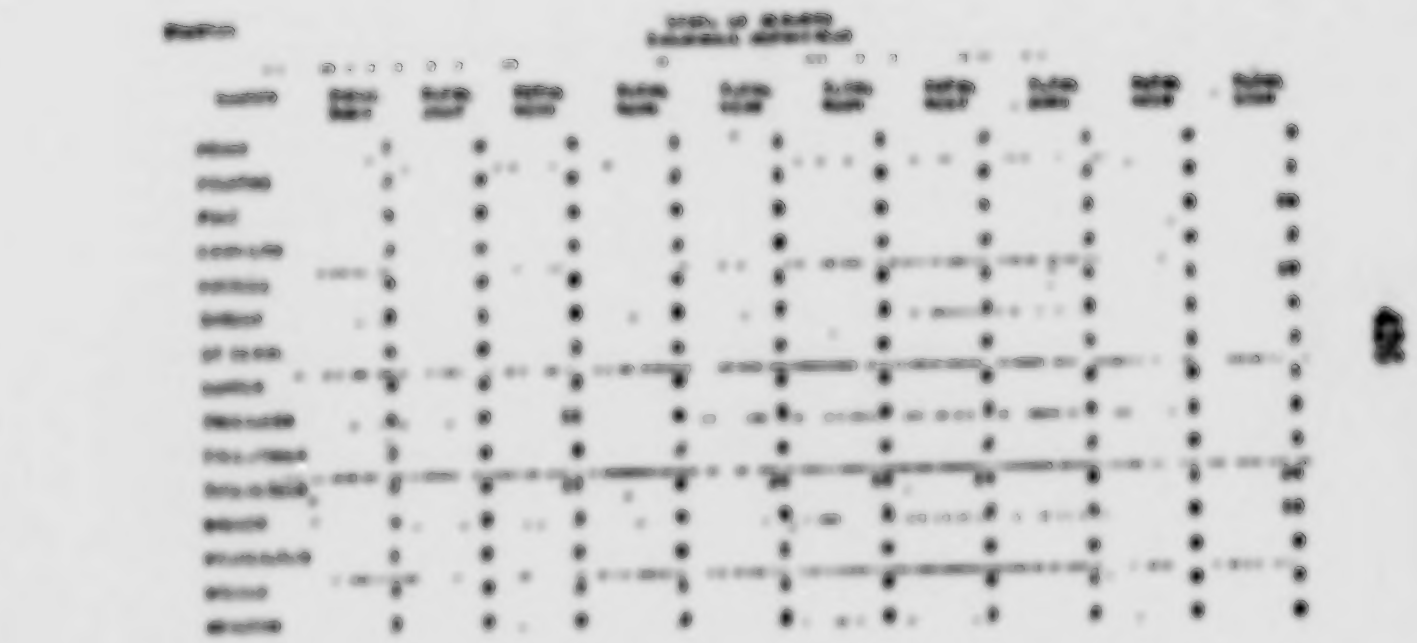
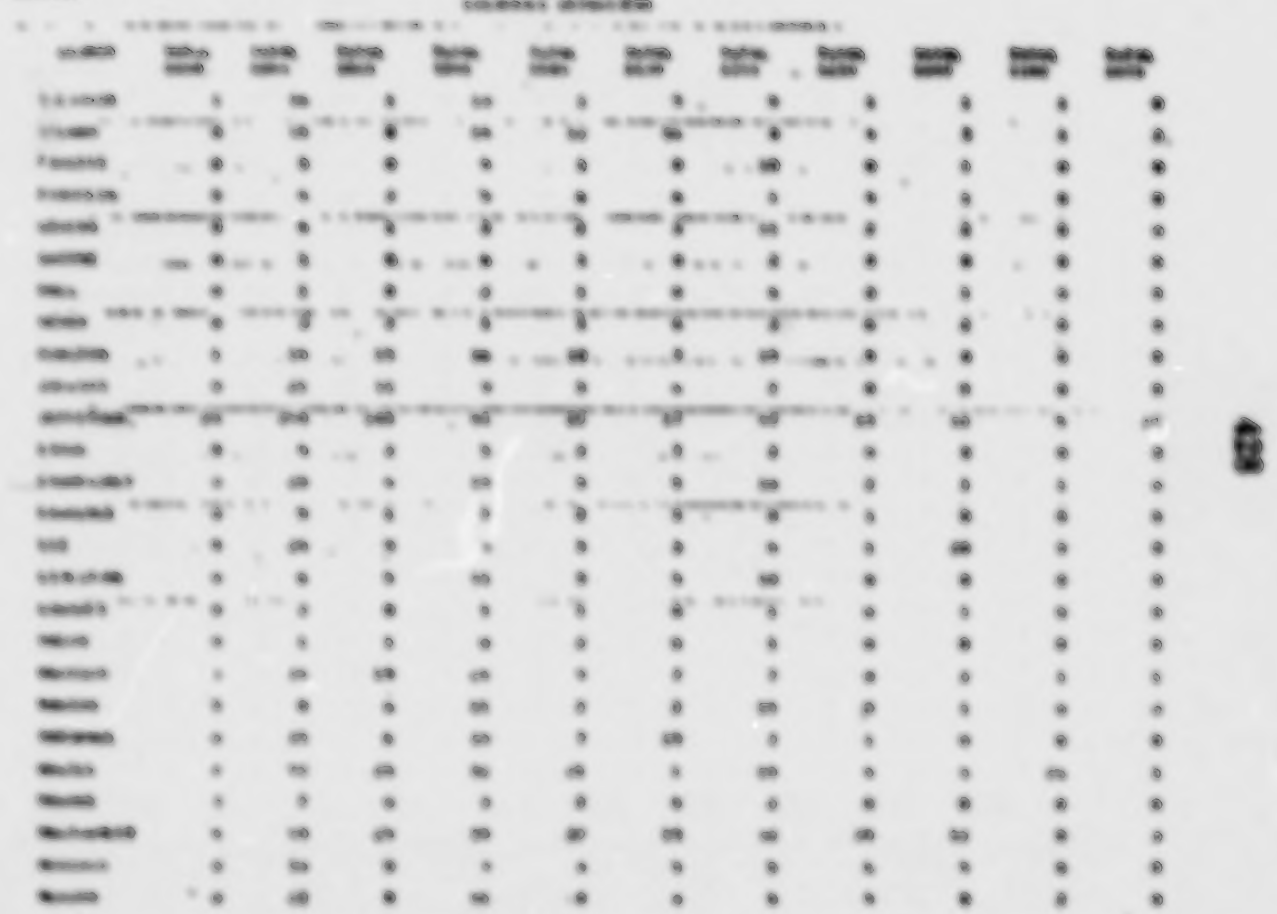




EXHIBIT B



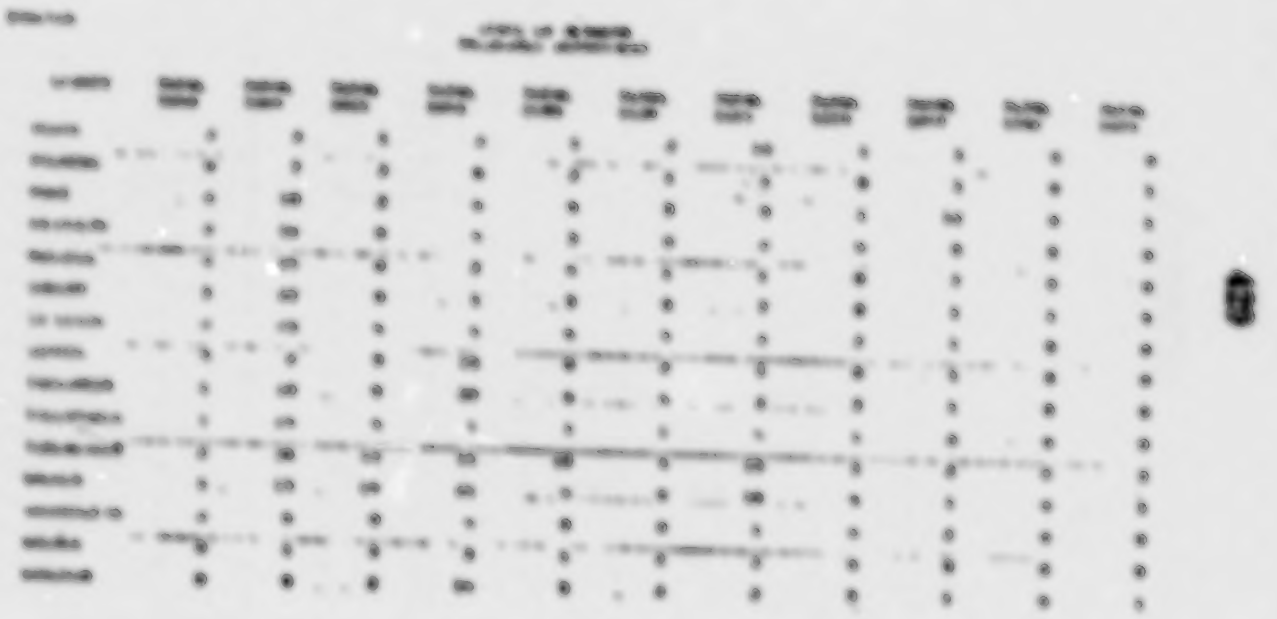
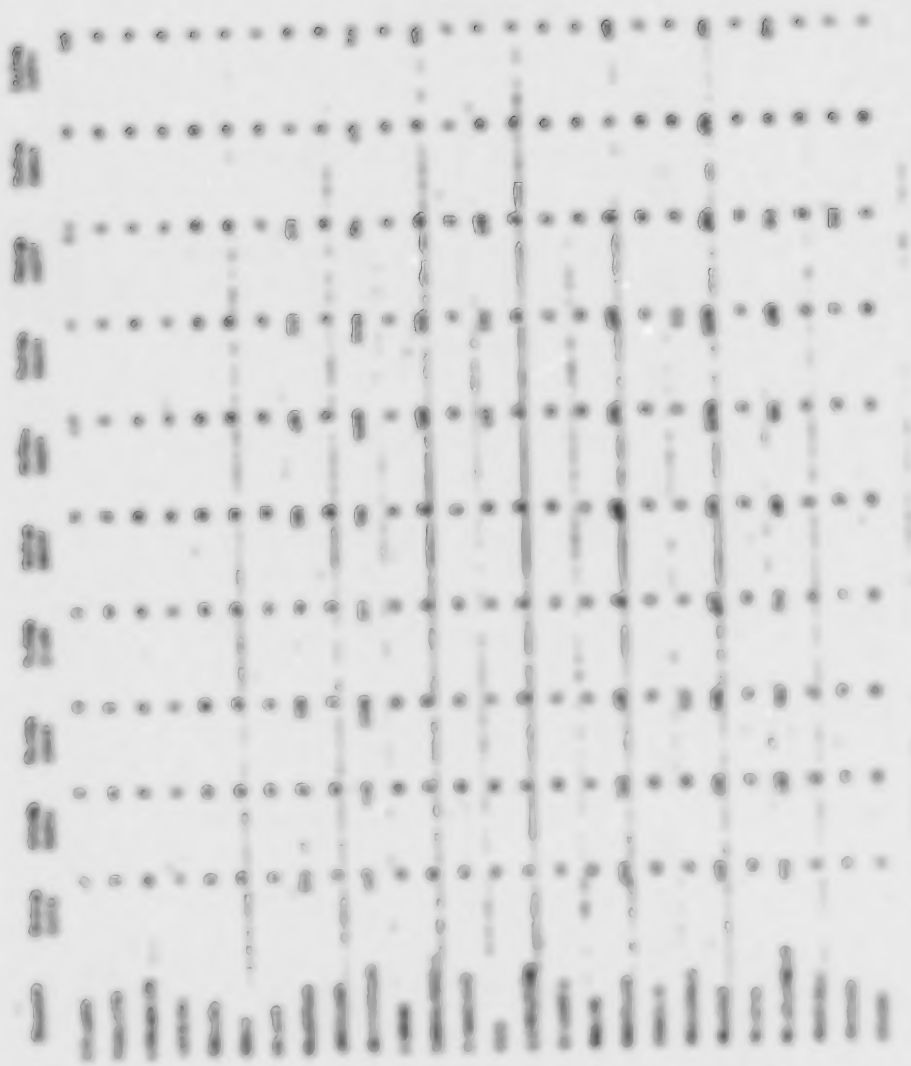
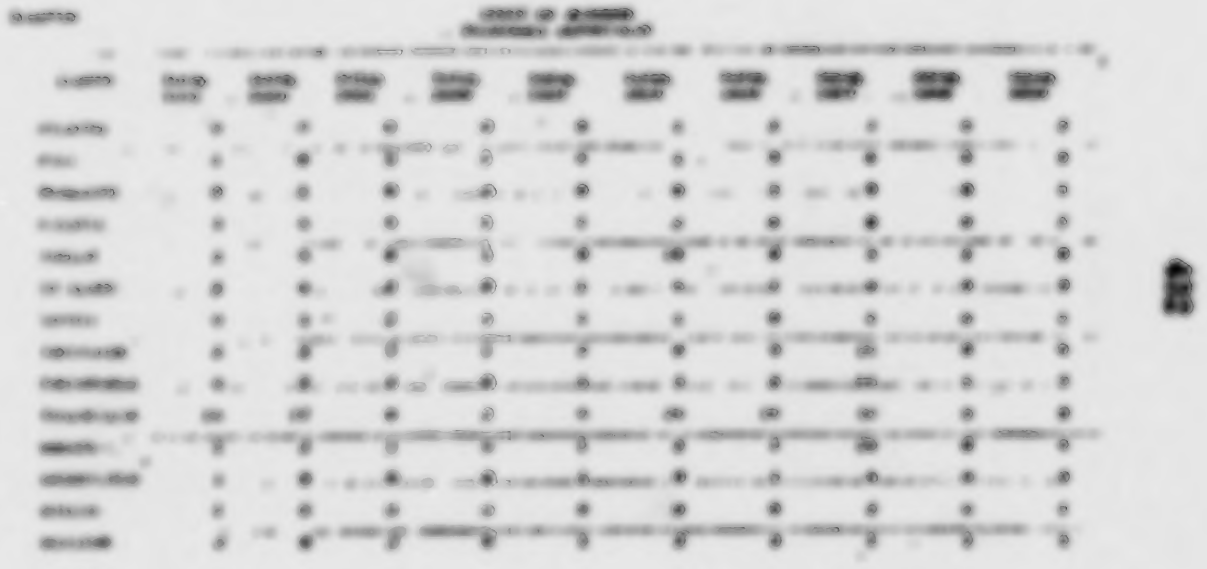


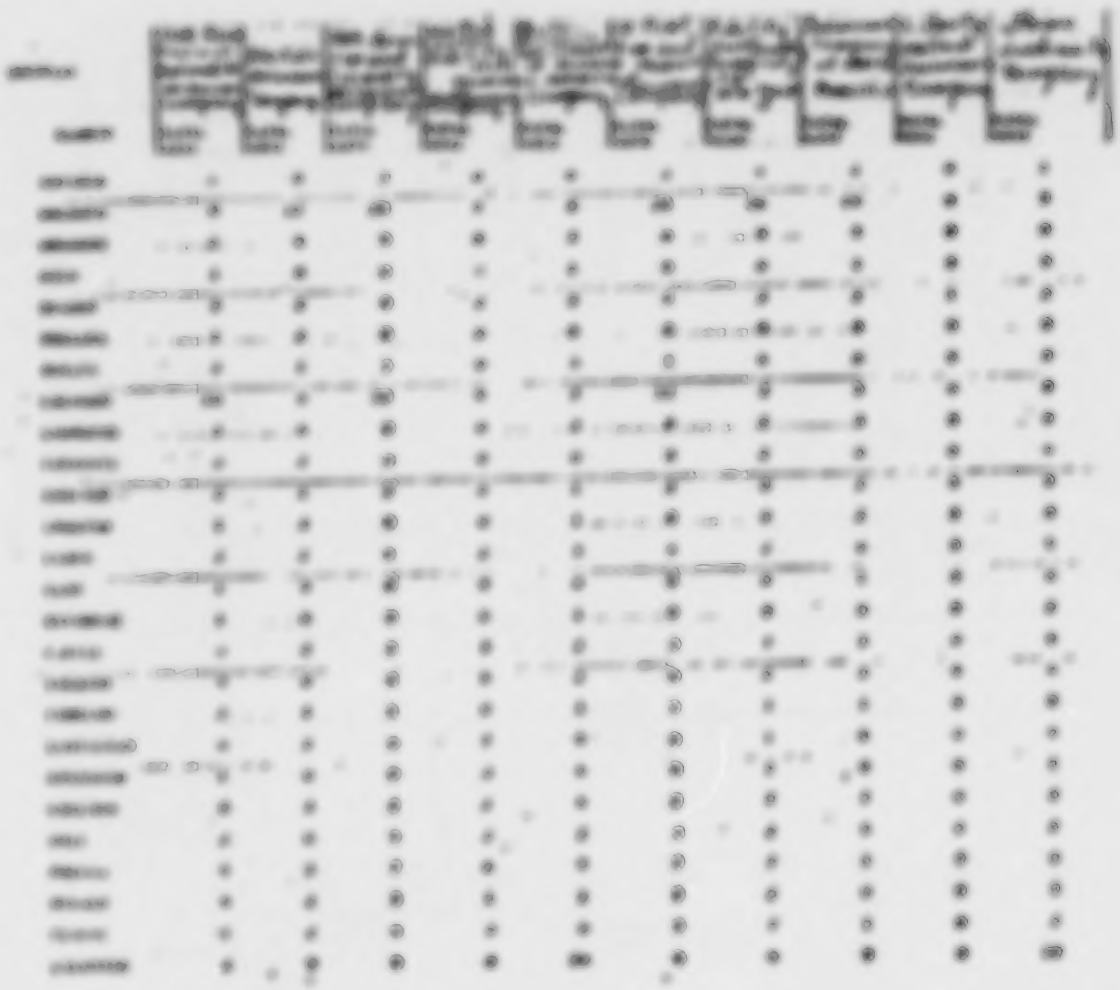
EXHIBIT 9

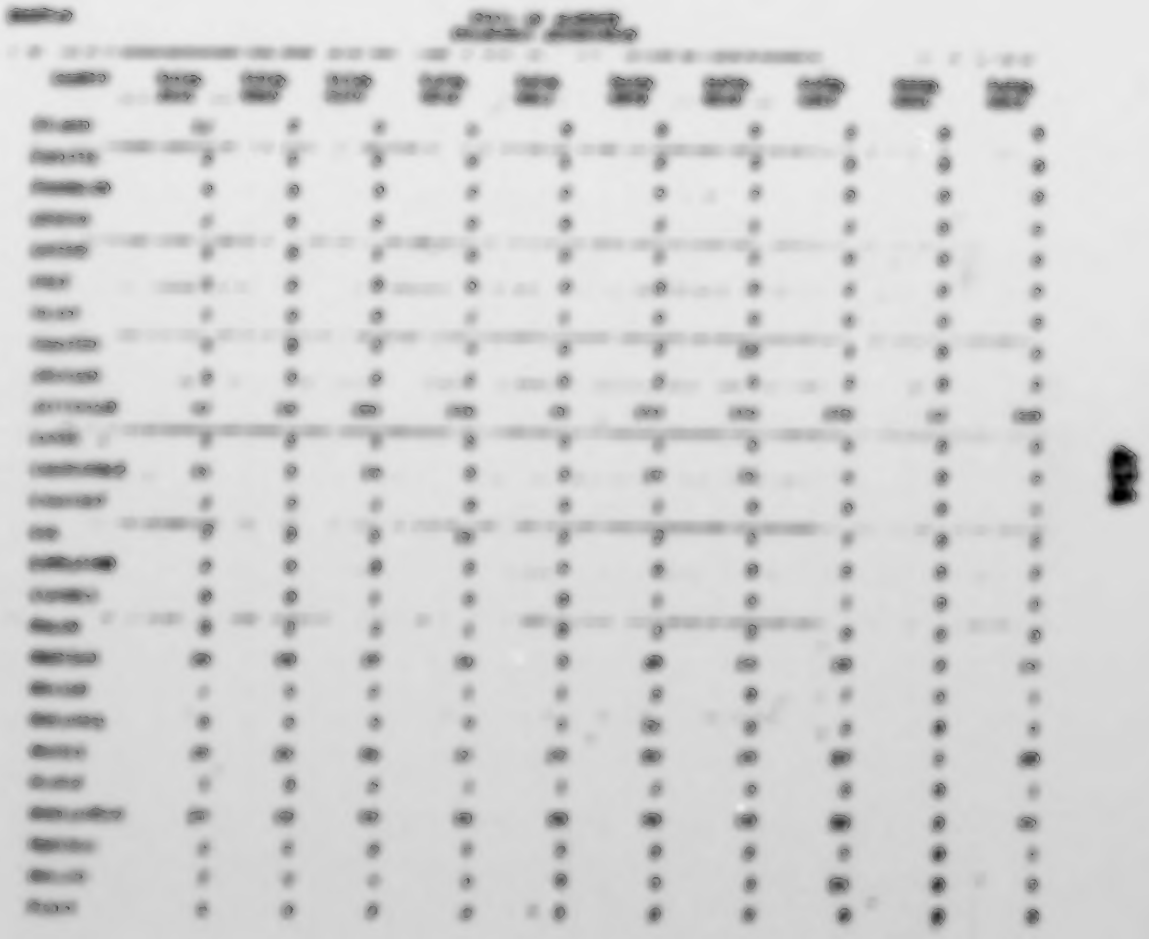












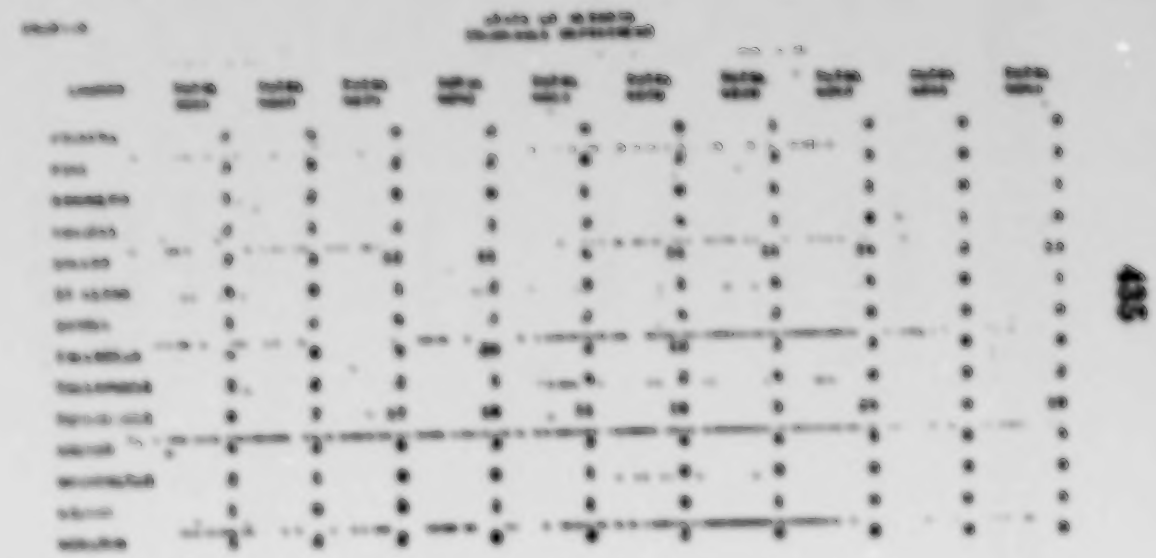


Exhibit 1. Capital and Surplus Requirements for Stock Life Company Formation in Alabama

| | Capital | Surplus |
|---|---|---|
| 1960 | $ 100,000 | $ 100,000 |
| 1961 | 100,000 | 100,000 |
| 1962 | 100,000 | 100,000 |
| 1963 | 100,000 | 100,000 |
| 1964 | 100,000 | 100,000 |
| 10/2/65 1966 | $ 200,000 | $ 300,000 |
| 1967 | 200,000 | 300,000 |
| 1968 | 200,000 | 300,000 |
| 1969 | 200,000 | 300,000 |
| 1970 | 200,000 | 300,000 |
| 1971 | 200,000 | 300,000 |
| 1972 | 400,000 | 600,000 |
| 1973 | $1,000,000 | $1,000,000 |
| 1974 | 1,000,000 | 1,000,000 |
| 1976 | 1,000,000 | 1,000,000 |
| 1977 | 1,000,000 | 1,000,000 |
| 1978 | 1,000,000 | 1,000,000 |
| 1979 | 1,000,000 | 1,000,000 |
| 1980 | 1,000,000 | 1,000,000 |
| 1981 | 1,000,000 | 1,000,000 |
| 1982 | 1,000,000 | 1,000,000 |



Exhibit 2. Relative Percentage Premium Tax on Foreign and Domestic Insurance Companies

| 1935-45 | | P & C | Other |
|---|---|---|---|
| | Foreign | 1.5 | 2.5 |
| | Domestic | 1.0 | 1.0 |

| 1945-55 | | P & C | Other |
|---|---|---|---|
| | Foreign | 1.5 | 2.5 |
| | Domestic | 1.5 | 2.5 |

| 1955-69 | | P & C | Other | Annuity Consid. | |
|---|---|---|---|---|---|
| | Foreign | 2.5 | 3.5 | 1 | REDUCED TAX RATE FOR FOREIGN COS. WITH REQUISITE INVESTMENTS IN ALABAMA |
| | Domestic | 0.5 | 0.5 | 0.5 | |

| 1969 | | P & C | Other | Annuity Consid. | |
|---|---|---|---|---|---|
| | Foreign | 4.0 | 3.0 | 1.0 | REDUCED TAX RATE FOR FOREIGN COS WITH REQUISITE INVESTMENTS IN ALABAMA |
| | Domestic | 1.0 | 1.0 | 1.0 | |

# EXHIBIT 3

ESTIMATED STATE PREMIUM TAX DIFFERENTIALS FOR USE IN ESTIMATING IMPACT ON FOREIGN INSURANCE COMPANIES

| | ANNUITY CONSIDERATIONS | | | LIFE AND ACCIDENT AND HEALTH PREMIUMS | | |
|---|---|---|---|---|---|---|
| | Foreign | Domestic | Differential | Foreign | Domestic | Differential |
| Alabama | .5 | .5 | 0 | .5 | .5 | 0 |
| Alaska | | | | | | |
| Arizona | | | | | | |
| Arkansas | .5 | .5 | 0 | .5 | .5 | 0 |
| Florida | | | | | | |
| Hawaii | .825 | .755 | .17 | .825 | .755 | .17 |
| Illinois | | | | | | |
| Indiana | | | | | | |
| Kansas | | | | | | |
| Kentucky | | | | | | |
| Maine | | | | | | |
| Michigan | | | | | | |
| Mississippi | | | | | | |
| Nebraska | | | | | | |
| North Carolina | | | | | | |
| Ohio | | | | | | |
| Oklahoma | | | | | | |
| Rhode Island | | | | | | |
| South Dakota | | | | | | |
| Tennessee | | | | | | |
| Texas | | | | | | |
| Washington | | | | | | |
| Wisconsin | | | | | | |
| Wyoming | | | | | | |

Source: State Retaliatory Taxation of the Insurance Industry, Council of State Governments, 1977, Appendix A.

| | | TOTAL | TOT.PREM. | CAPGUARP | BP/TP | TD/TP | TD/CB |
|---|---|---|---|---|---|---|---|
| PRUDENTIAL | PREMIUMS | 28096207B3 | 7592176871 | 2413958565 | .370067878 | .007336836 | .023081546 |
| | TAX DIFF. | 55717899 | | | | | |
| AETNA | PREMIUMS | 17205B5073 | 3458415633 | 966944066 | .497506736 | .009750081 | .034887009 |
| | TAX DIFF. | 33719832 | | | | | |
| METROPOLITA | PREMIUMS | 16317211B5 | 5502979203 | 2354305213 | .296516449 | .005683979 | .013285774 |
| | TAX DIFF. | 31278768 | | | | | |
| EQU.:ABLE | PREMIUMS | 13538136626 | 3258757997 | 1198476139 | .415445586 | .007889830 | .021428643 |
| | TAX DIFF. | 25681717 | | | | | |
| NEW YORK | PREMIUMS | 9462501B7 | 2531908025 | 1233273011 | .373730079 | .007028223 | .014428934 |
| | TAX DIFF. | 17794015 | | | | | |
| PROVIDENT | PREMIUMS | 3865664992 | 746196206 | 228627524 | .518[illegible]44 | .007669912 | .025020061 |
| | TAX DIFF. | 9720275 | | | | | |
| INDEPENDENT | PREMIUMS | 1289794B5 | 2083094?2 | 1505259?7 | .6[illegible]172301 | .003448677 | .004772577 |
| | TAX DIFF. | 718392 | | | | | |
| TRAVELERS | PREMIUMS | 10566446?0 | 2476563696 | 678525317 | .426738417 | .008298332 | .030288255 |
| | TAX DIFF. | 29931348 | | | | | |
| JOHN HANCOC | PREMIUMS | 6865206?7 | 1857136023 | 904135524 | .370464234 | .007317553 | .014998218 |
| | TAX DIFF. | 13560422 | | | | | |
| STATE FARM | PREMIUMS | 2901667?0 | 991162733 | 365879168 | .904373455 | .008165431 | .008530264 |
| | TAX DIFF. | 4827099 | | | | | |
| AVERAGE | | | | | .439206520 | .007257787 | .019972128 |

SOURCE: ANNUAL STATEMENTS FILED WITH THE ALABAMA DEPARTMENT OF INSURANCE



EXHIBIT 5. SIMULATED DIFFERENTIAL PREMIUM TAX BY STATE FOR TEN LARGEST DOMESTIC LIFE INSURANCE COMPANIES, LIFE AND ACCIDENT PREMIUMS ONLY, 1981

| | | ALABAMA | ALASKA | ARIZONA | ARKANSAS | FLORIDA | HAWAII | ILLINOIS | INDIANA | KANSAS |
|---|---|---|---|---|---|---|---|---|---|---|
| LIBERTY NAT | PREMIUMS | 147857185 | 24966 | 91612 | 204798 | 39141927 | 11095 | 159980 | 145902 | 50392 |
| | TAX DIFF. | 0 | 374 | 916 | 5130 | 782839 | 130 | 3200 | 2918 | 504 |
| PROTECTIVE | PREMIUMS | 41066769 | 10486 | 31779? | 1439219 | 6359992 | 308785 | 1375101 | 585040 | 1219136 |
| | TAX DIFF. | 0 | 157 | 3178 | 35980 | 127200 | 3613 | 27502 | 11701 | 12191 |
| MUTUAL SAVI | PREMIUMS | 30295285 | 641 | 3168 | 4253 | 1606695 | 298 | 11411 | 6585 | 2069 |
| | TAX DIFF. | 0 | 13 | 32 | 106 | 32130 | 3 | 228 | 132 | 21 |
| FEDERATED G | PREMIUMS | 17728975 | 0 | 0 | 30453 | 98239 | 0 | 0 | 0 | 0 |
| | TAX DIFF. | 0 | 0 | 0 | 761 | 1965 | 0 | 0 | 0 | 0 |
| LIFE INSURA | PREMIUMS | 8026590 | 0 | 0 | 1571 | 1815610 | 0 | 0 | 0 | 0 |
| | TAX DIFF. | 0 | 0 | 0 | 39 | 36172 | 0 | 0 | 0 | 0 |
| SOUTHERN UN | PREMIUMS | 6640904 | 0 | 0 | 91763 | 483824 | 0 | 0 | 0 | 0 |
| | TAX DIFF. | 0 | 0 | 0 | 2294 | 9676 | 0 | 0 | 0 | 0 |
| OLD SOUTHER | PREMIUMS | 6021414 | 0 | 2953 | 3577 | 147237 | 0 | 89677 | 2474 | 672 |
| | TAX DIFF. | 0 | 0 | 33 | 89 | 2945 | 0 | 1790 | 39 | 7 |
| NATIONAL SE | PREMIUMS | 4729747 | 0 | 0 | 0 | 95301 | 0 | 0 | 0 | 0 |
| | TAX DIFF. | 0 | 0 | 0 | 0 | 1906 | 0 | 0 | 0 | 0 |
| LOYAL AMERI | PREMIUMS | 3707525 | 583 | 2879 | 959549 | 80794 | 121 | 403799 | 648569 | 367548 |
| | TAX DIFF. | 0 | 9 | 29 | 23989 | 1616 | 1 | 8076 | 16971 | 3679 |
| EMPLOYERS L | PREMIUMS | 3342657 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | TAX DIFF. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| DIFFERENTIAL TAX RATE | | .02 | .015 | .01 | .025 | .02 | .0117 | .02 | .02 | .01 |

| QUESTION | DOLLARS | BLACKBURN | WORKING | MORNING | MARCH | MOTHER | PROVIDED |
|---|---|---|---|---|---|---|---|
| LIBRARY WAIT PROVIDED | 120995 | 9287 | 92843 | 1362791b1 | 197274 | 2895f49 | 12f469 | 329ef21 | 19fe1 |
| the DIFF. | 2320 | 93 | 1852 | 189f440 | 221 | 2858 | 3184 | 9162f | 719 |
| PROTECTING PROVIDED | 85b32f | 5f1b0 | 21b9c2e0 | 7e0b1b4 | 1792e4 | 67f8f312 | 2846150 | 413b7f | 9b76d |
| the DIFF. | 10532 | 872 | 21n0d | 111122 | 1969 | 67283 | 71059 | 17123 | 2f2f |
| REFUSAL SAVI PROVIDED | b03n2 | 62f | 7523 | 3b2f69d | 8b | 15f931 | 9e4i | 2773 | 3n02 |
| the DIFF. | 2b6 | 6 | 1f1 | 7b122 | 1 | 19e | 23f | 111 | 07 |
| PERMANED @ PROVIDED | 0 | 0 | 0 | 110b0d | 0 | 0 | 0 | 0 | 0 |
| the DIFF. | 0 | 0 | 0 | 1d5b | 0 | 0 | 0 | 0 | 0 |
| LIFE INSURA PROVIDED | 4170b0 | 0 | 0 | 67267f3 | 0 | 2b2997 | 0 | 0 | 0 |
| the DIFF. | 87b | 0 | 0 | 100ef | 0 | 2b40 | 0 | 0 | 0 |
| QUESTION UN PROVIDED | 0 | 0 | 0 | 2b7b86 | 0 | 0 | 0 | b02b0 | 0 |
| the DIFF. | 0 | 0 | 0 | 2715 | 0 | 0 | 9 | 2010 | 0 |
| OLD POLITER PROVIDED | 2b0 | 0 | b02e | 1b3f9130 | 2b1 | 79b | 77e | 302 | 12e |
| the DIFF. | 7 | 0 | 21 | 22e52f | 4 | 8 | 19 | 16 | 3 |
| ARTIBAL SE PROVIDED | 0 | 0 | 0 | 22e512 | 0 | 0 | 0 | 0 | 0 |
| the DIFF. | 0 | 0 | 0 | 2348 | 0 | 0 | 0 | 0 | 0 |
| LOYAL ARENI PROVIDED | 2566 | 16f9b10 | 627e7 | 3b7e0c6 | 6e5b0 | 16273 | 1b272e | 31e09c6 | 0 |
| the DIFF. | 3l | 16f9b | 1239 | 31111 | 976 | 183 | 3b10 | 2e09c | 0 |
| EMPLOYERS L PROVIDED | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| the DIFF. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |



| DEPOSIT | DELAWARE | BLACKBURN | NEIGHBORS | MIDNIGHT | PROVIDED | QUESTION |
|---|---|---|---|---|---|---|
| LIBRARY WAIT PROVIDED | 12b9e5 | 92b7 | 92b43 | 13b2e1b1 | 19774 | 2895f49 | 12f469 | 329e021 | 19fe1 |
| the DIFF. | 2320 | 93 | 18f9 | 189e440 | 221 | 2858 | 3184 | 9162f | 719 |
| PROTECTING PROVIDED | 85b32f | 5f1b0 | 21b9c2e0 | 7e0b1b4 | 1792e4 | 67f8f312 | 2846150 | 413b7f | 9b76d |
| the DIFF. | 10532 | 872 | 21n0d | 111122 | 1969 | 67283 | 71059 | 17123 | 2f2f |
| REFUSAL SAVI PROVIDED | b03n2 | 62f | 7523 | 3b2f69d | 8b | 15f931 | 9e4i | 2773 | 3n02 |
| the DIFF. | 2b6 | 6 | 1f1 | 7b122 | 1 | 19e | 23f | 111 | 07 |
| PERMANED @ PROVIDED | 0 | 0 | 0 | 110b0d | 0 | 0 | 0 | 0 | 0 |
| the DIFF. | 0 | 0 | 0 | 1d5b | 0 | 0 | 0 | 0 | 0 |
| LIFE INSURA PROVIDED | 4170b0 | 0 | 0 | 67267f3 | 0 | 2b2997 | 0 | 0 | 0 |
| the DIFF. | 87b | 0 | 0 | 100ef | 0 | 2b40 | 0 | 0 | 0 |
| QUESTION UN PROVIDED | 0 | 0 | 0 | 2b7b86 | 0 | 0 | 0 | b02b0 | 0 |
| the DIFF. | 0 | 0 | 0 | 2715 | 0 | 0 | 9 | 2010 | 0 |
| OLD POLITER PROVIDED | 2b0 | 0 | b02e | 1b3f9130 | 2b1 | 79b | 77e | 302 | 12e |
| the DIFF. | 7 | 0 | 21 | 22e52f | 4 | 8 | 19 | 16 | 3 |
| ARTIBAL SE PROVIDED | 0 | 0 | 0 | 22e512 | 0 | 0 | 0 | 0 | 0 |
| the DIFF. | 0 | 0 | 0 | 2348 | 0 | 0 | 0 | 0 | 0 |
| LOYAL ARENI PROVIDED | 2566 | 16f9b10 | 627e7 | 3b7e0c6 | 6e5b0 | 16273 | 1b272e | 31e09c6 | 0 |
| the DIFF. | 3l | 16f9b | 1239 | 31111 | 976 | 183 | 3b10 | 2e09c | 0 |
| EMPLOYERS L PROVIDED | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| the DIFF. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

| BIRTHDAY | the DIFF. | LIBRARY | EMPLOYERS L PROVIDED | LOYAL ARENI PROVIDED | ARTIBAL SE PROVIDED | the DIFF. | OLD POLITER PROVIDED | the DIFF. | QUESTION UN PROVIDED | the DIFF. | LIFE INSURA PROVIDED | PERMANED @ PROVIDED | the DIFF. | REFUSAL SAVI PROVIDED | the DIFF. | LIBRARY WAIT PROVIDED | the DIFF. | PROTECTING PROVIDED | the DIFF. | EMPLOYERS L PROVIDED | the DIFF. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| .02 | 0 | 52222 | 0 | 1852 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| .0028 | 0 | 18b6c07e0 | 0 | 1b2c7e1e1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| .028 | 0 | 6771b6 | 0 | 1890e40 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| .01 | 0 | 9l3l2 | 0 | 2895f49 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| .02 | 0 | 1884e90 | 0 | 32e0f21 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| .02 | 0 | 2b74 | 0 | 1627 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

| | | EQUAL | TOT.PREM. | CAP&SURP | AP/TP | EAP/TP | BP/TP | TD/TP | TD/CS |
|---|---|---|---|---|---|---|---|---|---|
| LIBERTY NAT | PREMIUMS | 222627827 | 276861982 | 192003943 | .5340468758 | .2700711999 | .0941180737 | .0041971134 | .0059991921 |
| | TAX DIFF. | 1159952 | | | | | | | |
| PROTECTIVE | PREMIUMS | 89096510 | 111480192 | 45177444 | .3610882039 | .3819914423 | .7138326662 | .0059415809 | .0158159954 |
| | TAX DIFF. | 674257 | | | | | | | |
| MUTUAL SAVI | PREMIUMS | 37794703 | 40194850 | 14011679 | .7837104612 | .1845777584 | .9402882196 | .0027989164 | .0080037460 |
| | TAX DIFF. | 112056 | | | | | | | |
| FEDERATED G | PREMIUMS | 18079404 | 18799416 | 2894366 | .9433059880 | .0186446478 | .9617506553 | 2.479852-4 | 1.610598-4 |
| | TAX DIFF. | 4662 | | | | | | | |
| LIFE INSURA | PREMIUMS | 12296314 | 13822647 | 3184220 | .5894681110 | .2408996263 | .8899577373 | .0058650020 | .0167779990 |
| | TAX DIFF. | 53425 | | | | | | | |
| SOUTHERN UN | PREMIUMS | 7885679 | 9937975 | 4762560 | .6690640121 | .1244449187 | .7934889519 | .0019907980 | .0031504439 |
| | TAX DIFF. | 18979 | | | | | | | |
| OLD SOUTHER | PREMIUMS | 7812174 | 8407321 | 2799539 | .6931266894 | .2106134995 | .9992601579 | .0032294886 | .0100504184 |
| | TAX DIFF. | 28950 | | | | | | | |
| NATIONAL SE | PREMIUMS | 5119947 | 6112589 | 1293854O | .7722997734 | .0682991536 | .8375991271 | 8.951898-4 | 4.229168-4 |
| | TAX DIFF. | 5472 | | | | | | | |
| LOYAL AMERI | PREMIUMS | 16304816 | 22098552 | 9943467 | .1677773823 | .9736750403 | .7414492227 | .0066186648 | .0107000274 |
| | TAX DIFF. | 146261 | | | | | | | |
| EMPLOYERS L | PREMIUMS | 3342656 | 3342656 | 756429 | 1 | 0 | 1 | 0 | 0 |
| | TAX DIFF. | 0 | | | | | | | |
| AVERAGE* | | | | | .6479620074 | .2145649258 | .8580131312 | .0029652249 | .0074826948 |

SOURCE: ANNUAL STATEMENTS FILED WITH THE ALABAMA DEPARTMENT OF INSURANCE, 1981



Exhibit 6. Estimated Financial Impact of Premium Tax Differential on Young Alabama Insurance Companies*

Property and Casualty Company Case:

Dec.31,1981

| | |
|---|---|
| Capital and Surplus | $11,618,220 |
| Total Premiums Written | 12,497,881 |
| Total Tax Differential | 374,936 |
| Percent Increase in C & S Attributable to Total Tax Differential | 374,936 / 1,118,220 = 33.51% |

| Year | Premiums Written |
|---|---|
| 1972 | 0 |
| 1973 | $3,618 |
| 1974 | 110,454 |
| 1975 | 257,772 |
| 1976 | 1,140,275 |
| 1977 | 1,699,502 |
| 1978 | 1,543,859 |
| 1979 | 1,992,792 |
| 1980 | 2,592,367 |
| 1981 | 3,131,343 |
| Total | 12,497,881 |

Source: Annual Statements filed with the Alabama Department of Insurance, 1973-1981.

*Capitol Fire and Marine Insurance Company (previously Alabama Rural Fire Insurance Company) and American Education Life Insurance Company.

Life Insurance Company Case

Rec. 11, 1983

| | |
|---|---|
| Capital and Surplus | $114,456 |
| Total Premiums Written | 6,481,788 |
| Total Tax Differential | 128,647 |
| Percent Increase in C & S | 128,647 |
| Attributable to Total Tax Differential | 112.3% |

| Year | Premiums Written |
|---|---|
| 1966 | 0 |
| 1967 | 0 |
| 1968 | 59,561 |
| 1969 | 132,889 |
| 1970 | 224,468 |
| 1971 | 291,463 |
| 1972 | 601,822 |
| 1973 | 579,844 |
| 1974 | 725,529 |
| 1975 | 764,238 |
| 1976 | 768,849 |
| 1977 | 861,851 |
| 1978 | 840,883 |
| 1979 | 611,869 |
| 1980 | 696,864 |
| 1981 | 635,413 |
| Total | 6,481,788 |

Source: Annual Statements Filed with the Alabama Department of Insurance, 1966-1981.

## EXHIBIT 7

Comparison of Premiums Written in Alabama and Admitted Assets in Alabama of Largest Foreign and Domestic Life Insurance and P and C Insurance Companies in Alabama, 1981

| | Premiums Written in Alabama in 1981 | Total Premiums Written in 1981 | Percent in Alabama | Admitted Assets in Alabama as of December 31, 1981 | Total Admitted Assets as of December 31, 1981 | Percent in Alabama |
|---|---|---|---|---|---|---|
| **FOREIGN** | | | | | | |
| **Life** | | | | | | |
| Prudential | $ 63,450,797 | $ 8,523,210,027 | 0.74% | $ none reported | $ 62,498,540,371 | —% |
| Aetna | 47,481,920 | 3,458,465,584 | 1.37 | 280,522,532 | 25,158,903,696 | 1.12 |
| Metropolitan | 45,757,523 | 5,972,075,118 | 0.77 | 653,210,483 | 51,757,844,543 | 1.26 |
| Equitable | 39,035,746 | 3,784,683,692 | 1.03 | 332,438,776 | 36,758,159,587 | 0.90 |
| New York Life | 37,972,178 | 2,473,658,992 | 1.54 | 274,245,696 | 21,119,316,399 | 1.30 |
| Provident | 30,027,579 | 279,171,734 | 10.76 | 40,017,579 | 1,951,239,589 | 2.07 |
| Independent | 24,331,444 | 214,951,155 | 11.32 | 36,413,143 | 679,956,999 | 5.35 |
| Travelers | 24,292,902 | 2,706,292,628 | 0.90 | none reported | 14,803,168,131 | — |
| John Hancock | 18,257,933 | 2,109,126,763 | 0.87 | 252,434,943 | 19,936,797,865 | 1.27 |
| State Farm Life | 17,496,423 | 644,077,039 | 2.72 | 40,015,193 | 3,759,828,815 | 1.06 |
| Total | $348,104,445 | $30,365,712,732 | 1.15% | $1,909,298,345 | $238,423,756,995 | 1.19%* |
| **Property and Casualty** | | | | | | |
| State Farm M. Auto. | $115,240,946 | $ 5,857,925,981 | 1.97% | $ 167,170,553 | $ 11,537,227,227 | 1.45 |
| Allstate Ins. | 83,662,406 | 5,172,836,671 | 1.62 | 224,426,429 | 8,621,922,874 | 2.60 |
| State Farm Fire | 63,448,670 | 2,603,299,784 | 2.44 | 52,869,703 | 3,583,572,868 | 1.48 |
| U.S. Fidelity & Guar. | 40,707,816 | 1,604,281,254 | 2.54 | none reported | 4,151,174,080 | — |
| Auto-Owners | 23,705,030 | 446,091,036 | 5.31 | 11,324,404 | 864,263,021 | 1.31 |
| Ins. Co. of N. Am. | 22,400,871 | 2,028,456,008 | 1.10 | none reported | 3,707,592,602 | — |
| Fidelity and Casualty | 21,389,383 | 349,082,070 | 6.13 | 44,705,181 | 396,251,834 | 11.28 |
| St. Paul Fire | 13,229,280 | 1,045,239,47? | 1.27 | 90,593,381 | 3,515,492,360 | 2.58 |
| Liberty Mutual | 12,613,217 | 1,147,761,992 | 1.10 | none reported | 6,121,225,954 | — |
| Home Indemnity | 8,018,194 | 745,147,404 | 1.08 | 7,292,168 | 373,316,788 | 1.95 |
| Total | $404,415,813 | $21,000,121,671 | 1.93% | $ 598,381,819 | $ 42,872,039,608 | 2.07%* |

## EXHIBIT 7—Continued

| | Premiums Written in Alabama in 1981 | Total Premiums Written in 1981 | Admitted Assets in Alabama as of December 31, 1981 | Total Admitted Assets as of December 31, 1981 | Percent in Alabama |
|---|---|---|---|---|---|
| **DOMESTIC** | | | | | |
| ***Life*** | | | | | |
| Liberty National | $151,684,736 | $ 283,184,233 | $ 619,247,652 | $ 1,665,574,803 | 37.19% |
| Protective Life | 45,428,700 | 114,237,453 | 68,323,253 | 417,430,130 | 16.37 |
| Mutual Savings Life | 30,301,553 | 40,703,400 | 88,322,805 | 172,940,976 | 45.78 |
| Federated Guaranty | 17,921,697 | 62,227,834 | 20,577,240 | 86,364,494 | 23.83 |
| Life Ins. Co. of Ala. | 8,219,608 | 13,864,442 | 28,472,170 | 40,223,113 | 70.59 |
| So. United Life | 6,648,904 | 9,383,287 | 16,508,752 | 27,405,993 | 60.24 |
| Old Southern | 6,071,439 | 8,624,597 | 7,729,231 | 14,208,629 | 54.40 |
| Natl. Security Ins. | 4,728,133 | 6,127,407 | 13,582,947 | 28,117,758 | 48.31 |
| Loyal American | 3,707,525 | 21,879,018 | 8,467,323 | 64,581,979 | 13.11 |
| Employers Life | 3,342,657 | 3,342,657 | 2,545,942 | 4,415,568 | 57.66 |
| Total | $278,054,952 | $ 563,573,328 | $ 873,877,315 | $ 2,521,372,424 | 34.66% |
| ***Property and Casualty*** | | | | | |
| Ala. Farm Bureau M.C. | $ 87,614,211 | $ 87,614,211 | $ 61,413,134 | $ 166,254,031 | 36.94% |
| Mutual Assurance | 24,540,938 | 24,540,948 | 6,783,083 | 51,784,960 | 13.10 |
| Hartford Ins. Co. of Ala. | 14,014,847 | 14,014,847 | not available | 31,446,964 | — |
| Federated Guaranty | 8,943,739 | 8,943,739 | 3,949,195 | 19,613,082 | 20.14 |
| American Liberty | 6,357,074 | 6,357,074 | 5,172,537 | 21,836,792 | 23.69 |
| So. Guaranty | 6,282,499 | 6,282,499 | 7,900,209 | 25,987,896 | 30.40 |
| Standard Fire | 6,118,994 | 6,118,994 | not available | 8,124,759 | — |
| Ala. Farm Bureau Mutual | 5,368,134 | 5,368,134 | 22,434,849 | 111,331,285 | 20.15 |
| Natl. Security Fire | 5,007,189 | 22,045,493 | 5,606,969 | 21,663,483 | 25.88 |
| Champion Ins. | 4,714,000 | 4,714,000 | 2,354,070 | 6,628,730 | 35.51 |
| Total | $168,961,635 | $ 219,384,658 | $ 115,614,046 | $ 464,671,982 | 27.20%* |

* Average of firms reporting their admitted assets in Alabama.

Note: The companies listed under each category are the ten largest firms based on total premiums written in Alabama.

Sources: For foreign companies, 1981 Annual Statements filed with Alabama Department of Insurance; for domestic companies, responses to survey forms sent out by Association of Alabama Life Insurance Companies.



## EXHIBIT 8

Comparison of Sate Deposits of Largest Foreign and Domestic Life Insurance and P & C Insurance Companies in Alabama, at December 31, 1981

| | Deposits in Alabama | Total Deposits | Alabama Deposits as a % of Total Deposits |
|---|---|---|---|
| FOREIGN | | | |
| Life | | | |
| Prudential | $ 388,504 | $106,688,643 | 0.48 |
| Aetna | 0 | 18,443,198 | 0.0 |
| Metropolitan | 140,318 | 70,240,621 | 0.2 |
| Equitable | 0 | 79,083,266** | 0.0 |
| New York Life | 112,613 | 44,424,825 | 0.3 |
| Provident | 0 | 38,356,771 | 0.0 |
| Independent | 0 | 2,020,644 | 0.0 |
| Travelers | 0 | 170,248,417 | 0.0 |
| John Hancock | 0 | 29,141,085 | 0.0 |
| State Farm Life | 0 | 1,455,434 | 0.0 |
| Total | $ 741,435 | $549,349,478 | 0.13 |
| Property and Casualty | | | |
| State Farm M. Auto. | $ 413,667 | $ 59,049,573 | 0.75 |
| Allstate | 0 | 25,447,132 | 0.0 |
| State Farm Fire | 121,933 | 26,499,100 | 0.7 |
| U.S. Fidelity & G. | 0 | 44,862,424 | 0.0 |
| Auto-Owners | 0 | 10,039,671 | 0.0 |
| Ins. Co. of N. Amer. | 0 | 73,588,663 | 0.0 |
| Fidelity & Casualty | 0 | 60,955 | 0.0 |
| St. Paul Fire* | 0 | 962,318 | 0.0 |
| Liberty Mutual | 0 | 20,346,250 | 0.0 |
| Home Indemnity | 0 | 76,863 | 0.0 |
| Total | $ 535,600 | $236,628,213 | 0.24 |
| DOMESTIC | | | |
| Life | | | |
| Liberty National | $ 4,163,198 | $ 6,238,435 | 66.72 |
| Protective Life | 961,742 | 3,348,723 | 40.9 |
| Mutual Savings Life* | 1,743,970 | 1,133,226 | 153.9* |
| Federated Guar. Life | 803,030 | 803,030 | 100.0 |
| So. United Life | 2,630,036 | 3,165,508 | 83.6 |
| Old Southern Life | 789,794 | 789,794 | 100.0 |
| National Security | 425,134 | 427,702 | 99.4 |
| Loyal American | 3,110,233 | 3,110,233 | 100.0 |
| Employers Life | 230,752 | 230,752 | 100.0 |
| Life Ins. Co. of Ala. | 661,773 | 1,626,677 | 40.7 |
| Total | $15,519,663 | $ 17,852,080 | 75.78 |
| Property and Casualty | | | |
| Ala. Farm Bureau M.C. | $ 1,402,079 | $ 1,402,079 | 100.0% |
| Mutual Assurance | 312,276 | 312,276 | 100.0 |
| Hartford Ins. Co. of Ala. | 3,234 | 25,223 | 12.9 |
| Federated Guar. M. | 26,782 | 29,066 | 92.9 |
| American Liberty | 1,551,087 | 1,639,402 | 94.6 |
| So. Guaranty | 1,217,401 | 1,217,401 | 100.0 |
| Standard Fire | 2,685,499 | 2,737,063 | 98.1 |
| Ala. Farm Bureau M.I. | 1,880,472 | 1,880,472 | 100.0 |
| Natl. Sec. Fire | 28,894 | 28,894 | 100.0 |
| Champion Insurance | 366,361 | 572,420 | 64.0 |
| Total | $ 9,482,289 | $ 9,844,280 | 96.32 |

Note: The companies listed under each category are the ten largest firms based on total premiums written in Alabama.

Source: 1981 Annual Statements filed with Alabama Department of Insurance.

*Discrepancies due to overdrafts.

**As per balance sheet in 1981 Annual Statement.

Exhibit 9. Results of 1981 Payroll Survey for Alabama Domestic Insurance Companies

| Company | 1981 Headquarters Employment | 1981 Headquarters Payroll |
|---|---|---|
| Old Southern Life Insurance Co. | 57 | $ 817,103 |
| Alabama Farm Bureau Mutual Casualty Ins. Co. | 380 | 5,392,742 |
| Champion Insurance Co. | 45 | 502,958 |
| American Liberty Insurance Co. | 99 | 1,355,000 |
| Life Insurance Company of Alabama | 98 | 1,366,784 |
| National Security Fire and Casualty Co. | 30 | 345,029 |
| National Security Insurance Co. | 53 | 749,675 |
| Employers Life Insurance Co. of Alabama | 20 | 329,861 |
| Mutual Assurance Society of Alabama | 30 | 494,460 |
| Loyal American Life Insurance Co. | 80 | 1,153,052 |
| Mutual Savings Life Insurance Co. | 251 | 2,660,885 |
| Southern United Life Insurance Co. | 61 | 874,324 |
| Protective Life Insurance Co. | 379 | 7,800,000 |
| Southern Guaranty Insurance Co. | 66 | 913,982 |
| Liberty National Life Insurance Co. | 1,042 | 18,935,420 |
| | 2,671 | $43,691,475 |

Exhibit 11. Percentage Breakdown of Premiums Written by Policy Type and By Line for the Ten Largest Foreign and Domestic Life Insurance Companies in Alabama, 1983

| | Percent of Life | | | | Percent of Total | |
|---|---|---|---|---|---|---|
| Foreign Life Co. | Ordinary | Credit | Group | Industrial | Life | Accident and Health |
| Prudential | 53.37 | 2.19 | 44.82 | 0.00 | 98.58 | 61.44 |
| Aetna | 19.42 | 0 | 80.57 | 0 | 85.38 | 74.42 |
| Metropolitan | | | | | | |
| Equitable | 58.96 | 0 | 40.04 | 0 | 85.12 | 34.80 |
| New York Life | 88.87 | 0 | 11.13 | 0 | 79.47 | 20.13 |
| Provident | 67.85 | 0.00 | 32.15 | 0 | 36.25 | 61.75 |
| Independent | 36.10 | 0 | 0.15 | 63.75 | 64.26 | 35.74 |
| Travelers | 32.85 | 0.11 | 66.99 | 0 | 22.43 | 77.57 |
| John Hancock | | | | | | |
| State Farm Life | 97.78 | 0.35 | 1.87 | 0 | 100 | 0 |
| Total | 61.23 | 0.43 | 32.44 | 6.40 | 94.88 | 45.12 |
| Domestic Life Co. | | | | | | |
| Liberty National | 66.76 | 0 | 2.20 | 30.96 | 71.51 | 28.49 |
| Protective Life | 36.14 | 13.41 | 50.46 | 0 | 50.56 | 49.44 |
| Mutual Savings | 23.98 | 2.58 | 8.46 | 32.97 | 68.29 | 31.90 |
| Natl. Guaranty | 93.12 | 4.58 | 2.30 | 0 | 98.40 | 1.60 |
| Life Ins. Co. (Miss) | 52.59 | 41.11 | 6.29 | 0 | 68.66 | 31.34 |
| So. United | 13.98 | 86.02 | 0 | 58.84 | 81.69 | 18.98 |
| Old Southern | 69.13 | 0 | 0.87 | 0 | 14.29 | 85.71 |
| Natl. Security | 23.63 | 1.97 | 0.42 | 74.58 | 74.56 | 25.44 |
| Legal American | 46.87 | 24.63 | 28.50 | 0 | 32.12 | 67.88 |
| Gerhopers | 67.24 | 12.36 | 40.46 | 0 | 80.35 | 19.65 |
| Total | 56.99 | 5.16 | 9.42 | 28.52 | 67.87 | 32.13 |
| TOTAL | 58.80 | 3.84 | 16.58 | 18.61 | 80.92 | 39.08 |

Source: Annual Statements Filed with the Alabama Insurance Department for 1983.



Exhibit 12. Source Data for Calculation of Average Policy Sizes for Foreign and Domestic Life Insurance Companies, 1983

| | Insurance in Force, $ | | | | Number of Policies, $ | | | |
|---|---|---|---|---|---|---|---|---|
| Foreign | Ordinary | Credit Life | Group | Industrial | Ordinary | Credit Life | Group | Industrial |
| Prudential | 1,332,881,876 | 88,716,317 | 1,325,716,782 | 5,317,415 | 81,838 | 67,871 | 37 | 3,962 |
| Aetna | 138,280,124 | | 2,144,947,887 | | 7,338 | | 462 | |
| Metropolitan* | | | | | | | | |
| Equitable | 621,888,453 | | 1,322,661,765 | | 14,888 | | 216 | |
| New York Life | 1,882,436,153 | | 278,811,288 | | 17,260 | | 115 | |
| Provident | 311,885,258 | 60,346 | 1,261,967,128 | | 17,243 | 36 | 723 | |
| Independent | 241,688,818 | | 2,421,288 | 211,853,329 | 11,288 | | 15 | 111,888 |
| Travelers | 311,189,888 | 2,112,368 | 312,138,488 | | 4,852 | 112 | 188 | |
| John Hancock* | | | | | | | | |
| State Farm Life | 1,888,488,188 | 18,117,241 | 68,888,811 | | 68,312 | 7,127 | 3 | |
| Total | 6,183,218,111 | 112,218,112 | 1,187,118,618 | 211,888,188 | 211,188 | 68,112 | 1,148 | 111,888 |
| Domestic | | | | | | | | |
| Liberty National | 4,188,788,888 | | 138,118,811 | 1,288,821,112 | 888,188 | | 111 | 1,818,128 |
| Protective Life | 878,112,188 | 218,188,888 | 1,811,112,211 | | 11,178 | 11,111 | 128 | |
| Mutual Savings | 211,882,188 | 11,118,888 | 11,111,888 | 111,111,888 | 12,112 | 18,181 | 1 | 882,278 |
| Nat. Guaranty | 1,111,111,111 | 12,888,282 | 11,188,818 | | 11,188 | 8,188 | 18 | |
| Life Ins. Co. (Miss) | 188,188,888 | 111,188,888 | 11,111,888 | | 11,188 | 11,118 | 11 | |
| So. United | 11,888,781 | 188,888,111 | | 11,112,112 | * | * | * | |
| Old Southern | 11,111,182 | | 111,128 | | 1,111 | | 1 | |
| Natl. Security | 11,881,881 | * | 1,218,188 | 18,888,148 | 1,178 | * | 11 | 111,888 |
| Legal American | 111,888,111 | 18,111,188 | 11,111,111 | | * | * | * | |
| Gerhopers | 11,142,718 | 1,888,118 | 18,112,188 | | 1,181 | 2,118 | 111 | |
| Total | 1,111,111,111 | 111,118,111 | 1,881,188,788 | 1,818,111,248 | | | | |
| TOTAL | 8,111,181,881 | 111,111,881 | 2,888,118,888 | 1,188,888,111 | 111,111 | 181,181 | 1,111 | 1,888,178 |

Source: Annual Statements Filed with Alabama Insurance Department

*Not Available

Exhibit 13. Average Policy Size by Type for Foreign and Domestic Life Insurance Companies, 1981

| | Ordinary $ | Credit Life $ | Group $ | Industrial $ |
|---|---|---|---|---|
| Foreign Life Co. | | | | |
| Prudential | 12,966 | 1,450 | 4,317,467 | 637 |
| Aetna | 18,990 | | 4,562,981 | |
| Metropolitan | | | | |
| Equitable | 20,910 | | 4,919,041 | |
| New York Life | 20,188 | | 2,405,270 | |
| Provident | 31,201 | 1,678 | 10,291,930 | |
| Independent | 9,059 | | 175,786 | 662 |
| Travelers | 18,365 | 7,933 | 1,784,852 | |
| John Hancock | | | | |
| State Farm Life | 21,942 | 2,510 | 22,962,872 | |
| Average of Totals, Foreign | 16,224 | 1,621 | 4,177,891 | 667 |
| Domestic Life Co. | | | | |
| Liberty National | 9,372 | | 2,350,525 | 320 |
| Protective Life | 13,697 | 3,406 | 8,560,190 | |
| Mutual Savings | 5,830 | 2,075 | 25,115,000 | 509 |
| Fed. Guaranty | 17,938 | 2,519 | 3,553,814 | |
| Life Ins. Co. (Ala) | 11,322 | 2,246 | 894,235 | |
| So. United | | | | |
| Old Southern | 13,475 | | 198,500 | |
| Natl. Security | 8,729 | | 96,808 | 517 |
| Loyal American | | | | |
| Employers Life | 6,770 | 3,245 | 77,130 | |
| Average of Totals, Dom. | 10,949 | 2,810 | 2,837,895 | 358 |

Source: Annual Statements filed with Alabama Dept. of Insurance; computed from source data in preceding exhibit.



## EXHIBIT 14

Comparison of Numbers of Licensed Agents of Largest Foreign and Domestic Insurers in Alabama, by County, January 1, 1982

| | Number of Licensed Agents, January 1, 1982 | | | |
|---|---|---|---|---|
| | Life Insurers | | P & C Insurers | |
| County | Domestic | Foreign | Domestic | Foreign |
| Autauga | 27 | 28 | 19 | 24 |
| Baldwin | 68 | 85 | 89 | 126 |
| Barbour | 49 | 22 | 45 | 24 |
| Bibb | 15 | 7 | 9 | 3 |
| Blount | 37 | 19 | 18 | 26 |
| Bullock | 12 | 8 | 15 | 3 |
| Butler | 32 | 22 | 21 | 13 |
| Calhoun | 120 | 106 | 99 | 70 |
| Chambers | 22 | 21 | 25 | 15 |
| Cherokee | 18 | 12 | 22 | 8 |
| Chilton | 27 | 16 | 15 | 10 |
| Choctaw | 19 | 9 | 16 | 7 |
| Clarke | 43 | 23 | 32 | 20 |
| Clay | 10 | 12 | 18 | 5 |
| Cleburne | 10 | 3 | 5 | 4 |
| Coffee | 59 | 21 | 67 | 33 |
| Colbert | 50 | 40 | 32 | 35 |
| Conecuh | 10 | 6 | 11 | 8 |
| Coosa | 5 | 0 | 2 | 0 |
| Covington | 58 | 30 | 55 | 39 |
| Crenshaw | 16 | 6 | 16 | 8 |
| Cullman | 66 | 33 | 45 | 37 |
| Dale | 33 | 29 | 29 | 22 |
| Dallas | 63 | 41 | 30 | 44 |
| DeKalb | 78 | 13 | 68 | 25 |
| Elmore | 51 | 25 | 34 | 31 |
| Escambia | 45 | 26 | 49 | 64 |
| Etowah | 153 | 67 | 70 | 68 |
| Fayette | 21 | 11 | 13 | 11 |
| Franklin | 30 | 21 | 39 | 27 |
| Geneva | 27 | 15 | 30 | 27 |

EXHIBIT 14—Continued

| County | Number of Licensed Agents, January 1, 1982 | | | |
|---|---|---|---|---|
| | Life Insurers | | P & C Insurers | |
| | Domestic | Foreign | Domestic | Foreign |
| Greene | 10 | 2 | 2 | 5 |
| Hale | 11 | 7 | 9 | 5 |
| Henry | 18 | 5 | 14 | 4 |
| Houston | 94 | 117 | 97 | 56 |
| Jackson | 54 | 28 | 22 | 23 |
| Jefferson | 631 | 1,084 | 440 | 1,213 |
| Lamar | 22 | 5 | 20 | 22 |
| Lauderdale | 97 | 63 | 62 | 74 |
| Lawrence | 25 | 9 | 17 | 14 |
| Lee | 80 | 73 | 74 | 37 |
| Limestone | 42 | 23 | 29 | 22 |
| Lowndes | 6 | 5 | 7 | 3 |
| Macon | 5 | 8 | 11 | 8 |
| Madison | 117 | 203 | 114 | 191 |
| Marengo | 36 | 13 | 42 | 14 |
| Marion | 45 | 18 | 15 | 30 |
| Marshall | 90 | 43 | 72 | 52 |
| Mobile | 536 | 475 | 275 | 416 |
| Montgomery | 204 | 292 | 190 | 218 |
| Morgan | 90 | 20 | 18 | 17 |
| Perry | 100 | 57 | 70 | 57 |
| Pickens | 22 | 4 | 14 | 6 |
| Pike | 22 | 8 | 8 | 3 |
| Randolph | 50 | 24 | 42 | 25 |
| Russell | 25 | 12 | 15 | 7 |
| Shelby | 30 | 31 | 41 | 29 |
| St. Clair | 49 | 55 | 42 | 26 |
| Sumter | 45 | 17 | 29 | 24 |
| Talladega | 21 | 8 | 5 | 18 |
| Tallapoosa | 75 | 47 | 40 | 30 |
| Tuscaloosa | 26 | 35 | 27 | 20 |
| Walker | 109 | 109 | 114 | 127 |
| Washington | 76 | 26 | 43 | 20 |
| Wilcox | 13 | 10 | 3 | 4 |
| Winston | 12 | 4 | 6 | 4 |
| Totals | 3,804 | 3,761 | 3,093 | 3,826 |

Source: Records of Alabama Department of Insurance.

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## EXHIBIT 15

Average Amount of Life Insurance in Force Per Family in States with Differential Premium Tax Provisions and in the United States, Selected Years, 1955-1980

| | Average Amount of Life Insurance in Force Per Family | | | | | As a % of U.S. Average | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1980 | 1975 | 1970 | 1965 | 1955 | 1980 | 1975 | 1970 | 1965 | 1955 |
| ALABAMA | $39,500 | $27,600 | $20,500 | $13,700 | $5,600 | 95.2% | 98.2% | 98.1% | 93.2% | 81.2% |
| Alaska | 50,100 | 28,500 | 18,200 | 11,700 | — | 120.7 | 101.4 | 87.1 | 79.6 | — |
| Arizona | 38,200 | 29,100 | 19,600 | 12,600 | 4,700 | 92.0 | 103.6 | 93.8 | 85.7 | 68.1 |
| Arkansas | 28,300 | 18,000 | 13,100 | 8,400 | 3,400 | 68.2 | 64.1 | 62.7 | 57.1 | 49.2 |
| Florida | 32,100 | 22,600 | 17,200 | 11,900 | 5,300 | 77.3 | 80.4 | 82.3 | 81.0 | 76.8 |
| Hawaii | 53,100 | 41,500 | 34,000 | 22,500 | — | 218.0 | 147.7 | 162.7 | 153.1 | — |
| Illinois | 48,500 | 32,600 | 23,300 | 16,800 | 8,200 | 116.9 | 117.4 | 111.0 | 114.3 | 118.8 |
| Indiana | 43,800 | 29,200 | 21,600 | 15,900 | 7,500 | 105.5 | 102.9 | 103.3 | 107.5 | 108.7 |
| Kansas | 42,600 | 28,100 | 19,400 | 13,300 | 6,000 | 102.7 | 100.0 | 92.8 | 90.5 | 87.0 |
| Kentucky | 33,000 | 22,500 | 16,900 | 11,000 | 4,900 | 79.5 | 80.1 | 80.9 | 74.8 | 71.0 |
| Maine | 32,400 | 23,200 | 17,200 | 12,100 | 5,600 | 78.1 | 82.6 | 82.3 | 82.3 | 81.2 |
| Michigan | 49,400 | 32,700 | 23,300 | 17,300 | 7,600 | 119.0 | 116.4 | 111.5 | 117.7 | 110.1 |
| Mississippi | 31,800 | 20,100 | 14,600 | 8,900 | 3,200 | 76.6 | 71.5 | 69.9 | 60.5 | 46.4 |
| Nebraska | 45,500 | 29,700 | 20,300 | 13,600 | 5,900 | 109.6 | 105.7 | 97.1 | 92.5 | 85.5 |
| North Carolina | 38,500 | 25,300 | 19,200 | 12,800 | 5,500 | 92.8 | 90.0 | 91.9 | 87.1 | 79.7 |
| Ohio | 45,800 | 30,100 | 22,400 | 15,900 | 8,100 | 110.4 | 108.5 | 107.2 | 108.2 | 117.4 |

EXHIBIT 15—Continued

| | Average Amount of Life Insurance in Force Per Family | | | | | As a % of U.S. Average | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1980 | 1975 | 1970 | 1965 | 1955 | 1980 | 1975 | 1970 | 1965 | 1955 |
| Oklahoma | 36,100 | 24,300 | 18,600 | 12,300 | 5,400 | 87.0 | 86.5 | 89.0 | 83.7 | 78.2 |
| Oregon | 36,700 | 23,100 | 17,300 | 12,800 | 5,000 | 88.4 | 82.2 | 82.8 | 87.1 | 72.5 |
| South Dakota | 39,100 | 24,600 | 16,900 | 11,300 | 4,200 | 94.2 | 87.5 | 80.9 | 76.9 | 60.9 |
| Tennessee | 39,500 | 26,800 | 19,600 | 12,800 | 5,700 | 95.2 | 95.4 | 92.8 | 87.1 | 82.6 |
| Texas | 43,200 | 28,200 | 20,400 | 13,800 | 6,100 | 104.1 | 100.4 | 97.6 | 93.9 | 88.4 |
| Washington | 36,300 | 24,900 | 18,600 | 13,000 | 5,400 | 87.5 | 88.6 | 88.9 | 88.4 | 78.3 |
| Wisconsin | 42,900 | 27,300 | 19,500 | 14,200 | 6,600 | 103.6 | 97.9 | 93.3 | 96.6 | 95.7 |
| Wyoming | 39,900 | 25,100 | 18,800 | 13,600 | 5,100 | 96.1 | 90.7 | 90.0 | 92.5 | 73.9 |
| U.S. Average | 41,500 | 28,100 | 20,900 | 14,700 | 6,900 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| Number of 24 States above the U.S. Average | 10 | 9 | 5 | 5 | 4 | | | | | |

Source: *Life Insurance Fact Book*. For 1980 data, see 1981 Edition, p. 25; for 1975 data, see 1976 Edition, p. 18; for 1970 data, see 1971 Edition, p. 23; for 1955 and 1965 data, see 1966 Edition, p. 21.

**ALL INSURANCE COMPANIES LICENSED IN THE STATE OF ALABAMA:**

On January 1, 1972, the Alabama Insurance Code, Act No. 407, H. 198 (Regular Session, 1971) became effective. Code provides for payment of the following additional fees—

| | |
|---|---|
| **Filing of Annual Statement** | **$10.00** |
| **Filing of Amendment to Articles of Incorporation** | **$ 5.00** |
| **Filing of Amendment to By-Laws** | **$ 5.00** |

\ fees must accompany the materials, when filed. Please inform all personnel in your organization responsible the filing of the materials of these requirements.

**'ORTANT NOTE** Under the Retaliatory Provision of Section 75 of the Alabama Insurance Code, the following s effect:

When by the laws of any other state the taxes, licenses and other fees, in the aggregate, are or would be im- posed upon Alabama insurers, which are in excess of the taxes, licenses and other fees, in the aggregate, im- posed by Alabama upon similar insurers of such other state, the same taxes, licenses and other fees, in the aggregate, imposed by such state shall be imposed by the Commissioner of Alabama on insurers of such other sta

Please insert the information requested below and attach this form to the Alabama premium tax statement, elements, to be filed with your application for renewal of company license.

| | |
|---|---|
| **Amount of tax which would be due your state by a similar Alabama insurer** | **$ 675,287.66** |
| **Fee for filing of annual statement by an Alabama insurer** | |
| **Fee for filing amendment to articles of incorporation of an Alabama insurer** | |
| **Fee for filing amendment to by-laws of an Alabama insurer** | |
| **Other fees imposed on an Alabama insurer** | $ |

**See Retaliatory Calculation attached**

STATE OF ALABAMA

RETALIATORY CALCULATION - 1977
NEW YORK STATE BOARD - DOMESTIC

**Life**

| | | |
|---|---|---|
| Gross Amount of Direct premiums, less return premiums thereon | | $ 34,417,281 |
| Deductions: | | |
| 1. Dividends to policyholders. | 3,104,913 | |
| 2. Employees' share of Group premiums under the contract issued by the Company for its employees | 27,031 | |
| Premiums subject to tax | 31,285,737 | |
| Tax at 1.6% | 500,571.79 | |

**Accident and Health**

| | | |
|---|---|---|
| Gross amount of direct premiums, less return premiums thereon | | 13,140,793 |
| Deductions: | | |
| 1. All dividends to policyholders. | 2,214,750 | |
| 2. Employees' share of Group premiums under the contract issued by the Company for its employees. | 490 | |
| Premiums subject to tax | 10,925,553 | |
| Tax at 1.6% | 174,809.85 | |

Total Tax - Life and Accident and Health 675,380.64

The State of New York imposes a net income tax upon the net income of companies domiciled in New York and elsewhere. This tax is not reflected in the retaliatory amount.



STATE OF ALABAMA

PREMIUM TAX STATEMENT
FOREIGN INSURANCE COMPANY

On Business in Alabama for the Year Ending December 31, 19 77

Metropolitan Life Insurance Company
Name of Company

New York — New York — 10010
State — State — Zip Code

NOTE: EACH FIRE AND CASUALTY COMPANY MUST COMPLETE A SEPARATE TAX STATEMENT FOR FIRE AND ALLIED LINES AND FOR CASUALTY LINES. SEPARATE CHECK IN PAYMENT OF TAX MUST BE ATTACHED TO EACH.

| | | |
|---|---|---|
| 1. Total admitted assets | | $ 58,253,420,530 |
| 2. Admitted assets in Alabama investments as defined in accompanying schedule | | $ 498,291,746 |
| 3. Percent admitted assets in Alabama investments of total admitted assets (line 2 divided by line 1) (Lines 1 through 3 need not be completed unless premium tax rate less than maximum is applicable) | | .8555% |
| 4. Direct premiums (exclusive of annuity considerations) received in Alabama or elsewhere for business done in Alabama | | $ 50,797,197 |
| 5. Reinsurance premiums received from companies not authorized to do business in Alabama | | $ |
| 6. TOTAL PREMIUMS (Line 4 plus line 5) | | $ 50,797,197 |
| 7. LESS- (a) Dividends paid, applied, or left with company to accumulate at interest | $ 4,320,779 | |
| 8. TOTAL DEDUCTIONS (line 7(a)) | | $ 4,320,779 |
| 9. TOTAL TAXABLE PREMIUMS (line 6 minus line 8) | | $ 46,476,418 |
| 10. Tax rate applicable based on percentage shown on line 3. If reduced tax rate is not applicable, use rate of 2% for life companies and 4% for all other companies | 2.9 % | |
| 11. PREMIUM TAX DUE (line 9 multiplied by tax rate shown on line 10) | | $ 1,347,972.57 |
| 12. Total annuity considerations received in Alabama or elsewhere for business done in Alabama (including annuities received from companies not authorized to transact business in Alabama) | | $ 2,388,594 |
| 13. LESS- (a) Dividends paid, applied, or left with company to accumulate at interest | $ 221,062 | |
| 14. TOTAL DEDUCTIONS (line 13(a)) | | $ 221,062 |
| 15. TAXABLE ANNUITY CONSIDERATIONS (line 12 minus line 14) | | $ 2,156,532 |
| 16. PREMIUM TAX DUE on annuity considerations (1% of line 15) | | $ 21,565.32 |
| 17. GROSS PREMIUM TAX (line 11 plus line 16) | | $ 1,369,537.89 |
| 18. LESS- (a) Ad valorem taxes paid for tax year next preceding filing of this return on real estate and improvements thereon in State of Alabama owned and at least 50% occupied by company for full period of such tax year | $ -0- | |
| (b) All franchise taxes paid under provisions of Section 40-14-40 or 40-14-41, Code of Alabama 1975, for the tax year preceding filing of the return | $ 1,238.72 | |
| (c) All expenses of examinations of company by Commissioner of Insurance of Alabama | $ 538.00 | |
| 19. TOTAL DEDUCTIONS (Total of lines 18(a), (b), and (c). NOTE: Copy of receipt in payment of taxes included herein must be attached to this statement) | | $ 1,776.72 |
| 20. NET PREMIUM TAX DUE (line 17 minus line 19) | | $ 1,367,761.17 |

STATE OF New York
COUNTY OF New York

Paul H. Price, Senior Vice-President and Controller, President and
J. Austin Lynch, Jr., Senior Vice-Pres., General Counsel and Secretary, Secretary of the
Metropolitan Life Insurance Company,
being duly sworn, each for himself, deposes and says, that they are the above described officers of said Company and that the foregoing statement of business transacted during such year and showing the true names of same on November 30, of such year, is full and correct according to the best of their information, knowledge and belief, respectively.

By, Vice-President and Controller, President
Vice-Presidents, General Counsel and Secretary

Subscribed and sworn to before me this 22 day of February, 19 78

(SEAL) My commission expires 3/30/79

Notary Public
New York

VINCENT H. HARRE
NOTARY PUBLIC, State of New York
No. 31-4509615 Qual. in Kings County
Certificate filed in New York County
Commission Expires March 30, 1979

DEPARTMENT OF INSURANCE

STATE OF ALABAMA
MONTGOMERY

Section 27, Code of Alabama 1975.

(3) Shares. Such term shall include every interest as provided in section 27-1-3 and shall also include every certificate issued by any corporation on the possession of which a holder is entitled to any dividend, interest or profit, or to participate in assets thereof, or to receive a certificate for membership stock by such corporation, association or business. Also the contingent interest as defined in section 27-1-4 and policy stock.

(4) Foreign insurer. Such term shall include any insurance company organized under the laws of any country or of the United States other than the State of Alabama and any corporation, association, organization, insurance or person the laws of which provide that similar companies organized under the laws of Alabama which transact business in the state of Alabama shall pay premiums, taxes or other charges of whatever kind or nature in the state of Alabama.

(5) Domestic insurer. Such term shall include any insurance company organized under the laws of the state of Alabama which transacts business in the state of Alabama.

(6) Policyholder. Such term shall include an individual, firm or corporation, or other entity, who is the owner of any insurance policy or contract or otherwise has title to the right or consideration for the insurance contract.

(7) Premiums.

a. Insurance premiums received.

b. Assessments previously fixed, annuities considered contributed to the Department of Alabama and agents in the premiums and provided for in the insurance contract.

c. Considerations received, added or left with the company as consideration or premiums.

With respect to life insurance, the term "premiums" shall not include charges for attempting unpaid reporting, investigation as to the insured risk, policy and closing services and other unpaid services which may be performed or furnished to the policyholder or applicant in connection with the issuance of such policy.

(8) Premium contributions. All money received as contributions for premium participating (Acts 1935, Ex. Sess., No. 77, p. 212, § 1; Acts 1943, 2nd Ex. Sess., No. 77, p. 212, § 1; Acts 1947, Ex. Sess., No. 58, p. 74, § 1; Acts 1971, No. 627, p. 1127, § 77; Acts 1971, No. 2108, p. 3870, § 1.)

§27-4-2. Amount and standard of valuation of reserves.

Each authorized insurer shall annually, on or before March 1, file with the commissioner a statement, on forms as furnished or approved by him, showing both the total amounts of premiums and annuity considerations received by it for business done in this state during the preceding calendar year ending December 31, thereto, as to and including such year, and the total amounts of dividends, returned premiums, claims, annuities and benefits paid or allowed in this state during the preceding calendar year ending December 31, thereto, as to and including such year, and such other information as may be required by the commissioner for the purpose of enabling him to verify the correctness of the annual statement of each insurer. (Acts 1935, Ex. Sess., No. 77, p. 212, § 2; Acts 1943, 2nd Ex. Sess., No. 77, p. 212, § 2; Acts 1947, Ex. Sess., No. 58, p. 74, § 2; Acts 1971, No. 627, p. 1127, § 77; Acts 1971, No. 2108, p. 3870, § 2.)

§27-4-3. Annual non-foreign insurer.

(a) Every foreign insurer, except foreign life insurers, shall pay an annual premium tax amounting to two percent of the premiums received for such foreign insurer for business done in this state during the preceding calendar year ending December 31, thereto, as to and including such year, and the total amounts of dividends, returned premiums, claims, annuities and benefits paid or allowed in this state during the preceding calendar year ending December 31, thereto, as to and including such year, and such other information as may be required by the commissioner for the purpose of enabling him to verify the correctness of the annual statement of each insurer. (Acts 1935, Ex. Sess., No. 77, p. 212, § 3; Acts 1943, 2nd Ex. Sess., No. 77, p. 212, § 3; Acts 1947, Ex. Sess., No. 58, p. 74, § 3; Acts 1971, No. 627, p. 1127, § 77; Acts 1971, No. 2108, p. 3870, § 3.)

§27-4-4. Annual non-foreign insurer.

(a) Every foreign insurer, except foreign life insurers, shall pay an annual premium tax amounting to two percent of the premiums received for such foreign insurer for business done in this state during the preceding calendar year ending December 31, thereto, as to and including such year, and the total amounts of dividends, returned premiums, claims, annuities and benefits paid or allowed in this state during the preceding calendar year ending December 31, thereto, as to and including such year, and such other information as may be required by the commissioner for the purpose of enabling him to verify the correctness of the annual statement of each insurer. (Acts 1935, Ex. Sess., No. 77, p. 212, § 4; Acts 1943, 2nd Ex. Sess., No. 77, p. 212, § 4; Acts 1947, Ex. Sess., No. 58, p. 74, § 4; Acts 1971, No. 627, p. 1127, § 77; Acts 1971, No. 2108, p. 3870, § 4.)

| Percentage of insurer's Admitted Assets invested in Alabama investments | Applicable Rate of Premium Tax for Foreign Life Insurers | Applicable Rate of Premium Tax for All Other Foreign Insurers |
|---|---|---|
| Less than 1% | 2.5% | 2.0% |
| 1% and above but less than 2% | 2.5% | 2.0% |
| 2% and above but less than 3% | 2.5% | 2.0% |
| 3% and above but less than 4% | 2.5% | 2.0% |
| 4% and above but less than 5% | 2.5% | 2.0% |
| 5% and above but less than 6% | 2.5% | 2.0% |
| 6% and above but less than 7% | 2.5% | 2.0% |
| 7% and above but less than 8% | 2.5% | 2.0% |
| 8% and above but less than 9% | 2.5% | 2.0% |
| 9% and above but less than 10% | 2.5% | 2.0% |
| 10% and above | 2.5% | 2.0% |

(b) Alabama investments, as used in this section, shall have one of the following characteristics:

(1) Bonds issued in this state.

(2) Bonds or secured housing authority or other evidences of indebtedness of the State of Alabama or of any county, city or town of this state, or of any public school, school district, water conservation district, drainage district or other political subdivision of the state, or of any state instrumentality, agency, board or authority of the State of Alabama or of any municipal corporation, or of any state, county or city bond, whether such bonds are issued or guaranteed by such municipal corporation or by the state of Alabama, or by any county, city or town of this state.

(3) Stocks, bonds or other evidences of indebtedness of any corporation organized under the laws of the State of Alabama or of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of such corporation, conditions as to be determined in Alabama region to the total premiums received by the company from Alabama business.

(4) Any such bond to be considered shall be subject to credit and deposit of not to exceed of:

(i) All life insurance issued and to the amount for the two year next preceding the fiscal of the month required by this section when and where and the corporations charged in the state of Alabama carried and to bank, 50 percent assigned to the amount for the full period of such two year;

(ii) All insurance issued and taken paid to and credited on the date during the year immediately next fiscal of the month required by the section and the average of ending of the business of insurance within said county;

(iii) All Alabama loans paid by the insurer under the provisions of sections 40-14-60 or 40-14-61 for the two year preceding the fiscal of the month required by this section; and

(iv) All obligations of instrumentalities of the United States as defined in section 1532, Tit. 15A, Code 1940, T. 15 § 1532, Acts 1935, Ex. Sess., No. 77, p. 193, § 2; Acts 1969, Ex. Sess., No. 58, p. 74, § 2; Acts 1971, No. 627, p. 141, § 10; Act 1971, No. 2108, p. 3870, § 2.)

§27-4-5. Taxes—Deductions allowed.

(a) Every domestic life insurer shall pay to the commissioner on or before March 1, 1976 and annually thereafter, a premium tax equal to one percent of the premiums and annuity considerations received by it for such persons for business done in this state during the preceding calendar year ending December 31, whether the policy was privately procured by said insurer at the date of issuance. Every other domestic insurer and every foreign insurer organized pursuant to the provisions of section 10-4-130 et seq. shall pay to the commissioner on or before March 1, 1976, and annually thereafter, a premium tax equal to two percent of the premiums received by such insurer for business done during the preceding calendar year ending December 31, whether the policy was privately procured by such insurer at the date of issuance. Any domestic insurer beginning business after January 1, of any calendar year, and on or before March 1, of the year following the year beginning business, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section. Any foreign insurer organized under the laws of any other state of the United States, to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(1) Stocks, bonds, notes, debentures or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(2) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(3) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(4) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(5) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(6) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(7) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(8) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(9) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(10) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(11) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(12) Stocks, bonds, notes or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(13) The percentage of the insurer's investments held as of December 31, as shown thereon of the United States of America as of the total premiums received by the company for shown insurance of sub-shall forward, insurer as to be determined in Alabama region to the total premiums received by the company.

(c) Any such tax to be disallowed shall be subject to credit and deduction of not to exceed of:

(1) All of insurance issued paid by the insurer for the two year next preceding the fiscal of the month required by this section when and where and the corporations charged in the state of Alabama carried and to bank, 50 percent assigned to the amount for the full period of such two year;

(2) All taxes paid and taken paid to and credited on the date during the year immediately next fiscal of the month required by the section and the average of ending of the business of insurance within said county;

(3) All Alabama loans paid by the insurer under the provisions of sections 40-14-60 or 40-14-61 for the two year preceding the fiscal of the month required by this section; and

(4) All obligations of instrumentalities of the United States as defined in section 1532, Tit. 15A, Code 1940, T. 15 § 1532, Acts 1935, Ex. Sess., No. 77, p. 193, § 2; Acts 1969, Ex. Sess., No. 58, p. 74, § 2; Acts 1971, No. 627, p. 141, § 10; Act 1971, No. 2108, p. 3870, § 2.)

§27-4-6. Taxes—Deductions allowed.

(a) Every domestic life insurer shall pay to the commissioner on or before March 1, 1976 and annually thereafter, a premium tax equal to one percent of the premiums and annuity considerations received by it for such persons for business done in this state during the preceding calendar year ending December 31, whether the policy was privately procured by said insurer at the date of issuance. Every other domestic insurer and every foreign insurer organized pursuant to the provisions of section 10-4-130 et seq. shall pay to the commissioner on or before March 1, 1976, and annually thereafter, a premium tax equal to two percent of the premiums received by such insurer for business done during the preceding calendar year ending December 31, whether the policy was privately procured by such insurer at the date of issuance. Any domestic insurer beginning business after January 1, of any calendar year, and on or before March 1, of the year following the year beginning business, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section. Any foreign insurer organized under the laws of any other state of the United States, to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation, shall make such a statement to the commissioner for the period of time it has been in business and annually thereafter, and shall pay to the commissioner for the preceding calendar year or fraction thereof, which is applicable to it, a premium tax for such term year or fraction thereof, as provided in this section.

(1) The percentage of the insurer's investments held as of December 31, as shown thereon of the United States of America as of the total premiums received by the company for shown insurance of sub-shall forward, insurer as to be determined in Alabama region to the total premiums received by the company.

(c) Any such tax to be disallowed shall be subject to credit and deduction of not to exceed of:

(1) All of insurance issued paid by the insurer for the two year next preceding the fiscal of the month required by this section when and where and the corporations charged in the state of Alabama carried and to bank, 50 percent assigned to the amount for the full period of such two year;

(2) All taxes paid and taken paid to and credited on the date during the year immediately next fiscal of the month required by the section and the average of ending of the business of insurance within said county;

(3) All Alabama loans paid by the insurer under the provisions of sections 40-14-60 or 40-14-61 for the two year preceding the fiscal of the month required by this section; and

(4) All obligations of instrumentalities of the United States as defined in section 1532, Tit. 15A, Code 1940, T. 15 § 1532, Acts 1935, Ex. Sess., No. 77, p. 193, § 2; Acts 1969, Ex. Sess., No. 58, p. 74, § 2; Acts 1971, No. 627, p. 141, § 10; Act 1971, No. 2108, p. 3870, § 2.)

§27-4-7. Penalty for violation of sections 27-4-2 through 27-4-6.

Every insurer failing to comply with the requirements of section 27-4-2 through 27-4-6 shall, for default in a premium of not less than $100.00, for every day during $1,000.00, disapprove of an amount brought by the attorney general for the collection thereof. Every such default shall, at the discretion of the commissioner, also be sufficient cause for the suspension or revocation of the certificate of authority. Proceeds collected under this section shall be paid into the state premium in the order of the general fund. (Acts 1935, Ex. Sess., No. 77, p. 193, § 6; Acts 1971, No. 627, p. 141, § 6.)



ADMITTED ASSETS IN ALABAMA INVESTMENTS AS OF DEC. 31, SECTION 27-4-4, CODE OF ALABAMA 1975, YEAR ENDING DECEMBER 31, 19 75

Metropolitan Life Insurance Company

of New York, New York

| | | |
|---|---|---|
| ( 1) | Real Estate in the State | $ |
| ( 2) | Bonds or secured housing authority or other evidences of indebtedness of the State of Alabama, or of any county, city, town, school district, water conservation district, drainage district or other political subdivision of the State, or of any municipal corporation, or of any state, county or city bond, whether such bonds are issued or guaranteed by such municipal corporation or by the state of Alabama, or by any county, city or town of this state, or of any public school, school district, water conservation district, drainage district or other political subdivision of the state, or of any state instrumentality, agency, board or authority of the State of Alabama or of any municipal corporation, whether such agency, board or authority has taxing power or not | $ |
| ( 3) | Stocks, bonds or other evidences of indebtedness of any corporation organized under the laws of the State of Alabama | $ |
| ( 4) | Notes or bonds secured by mortgages or other liens on real estate or on leasehold interests in real estate in the State of Alabama | $ 59,535,000 |
| ( 5) | Stocks, bonds, debentures, notes or other evidences of indebtedness of any corporation organized under the laws of the State of Alabama | $ 110,047,000 |
| ( 6) | Notes, debentures, or other evidences of any indebtedness of any business operated as a sole proprietorship, partnership, or other legal entity, having its principal office and place of business in the State of Alabama | $ |
| ( 7) | Notes, bonds or other evidences of indebtedness secured by mortgages or other liens upon real estate situated in the State of Alabama and issued or guaranteed as to principal or as to both or in part by the United States or any agency or instrumentality thereof, including but not limited to any bonds, debentures or other evidences of the indebtedness of the United States or any agency or instrumentality thereof received and retained in lieu or partial settlements of any such assurance or guaranty | $ 64,573,747 |
| ( 8) | Collateral loans to Alabama residents or to others where at least one-half of the value of the collateral or pledged obligations are Alabama investments, as defined herein | $ |
| ( 9) | Cash deposits in regularly established national or state banks in the State on the basis of the average monthly deposits throughout the calendar year | $ 83,[illegible] |
| (10) | Loans secured by policies on the lives of residents of the State of Alabama | $ 15,[illegible] |
| (11) | Share or share accounts of building and loan associations organized under the laws of the State of Alabama or of the shares or share accounts of Federal savings and loan associations having their principal office in the State of Alabama | $ |
| (12) | Stocks, bonds, notes, debentures or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States to the extent that the assets of such corporation located in the State of Alabama bear to the total assets of the corporation among such stocks, bonds, notes, or other evidences of indebtedness | $ 349,000,335 |
| (13) | Stocks, bonds, notes or other evidences of indebtedness issued by municipal corporations, public agencies or instrumentalities, to the extent that the percentage or fraction of Alabama taxes to the total taxes through or business of such municipal corporation | $ 35,515,000 |
| (14) | Stocks, bonds, notes or other evidences of indebtedness of any corporation, public agency, authority of any municipality, instrumentality, agency, power authority or other public entity to the extent that the revenue of such corporation located in the State of Alabama bears to the total revenue of such corporation, telephone, electric power company, or other public entity | $ |
| (15) | That percentage of the company's investments held as of December 31, as shown thereon of the United States of America as of the total premiums received by the company for shown insurance of policies issued, required or to be determined in Alabama region to the total premiums received by the company:<br>(a) Total premiums received $ 3,[illegible]<br>(b) Shown premiums received in Alabama $ [illegible]<br>(c) Percentage of Alabama premiums to total premiums [illegible]<br>(d) Investments in direct obligations of United States Government $ 1,[illegible]<br>(e) Amount to be included in Alabama investments (line 15 (d) multiplied by line 15(c) | $ 89,573,625 |
| (16) | Total of lines 1 through 15 | $ 699,745,707 |

THE ABOVE LISTED ADMITTED ASSETS IN ALABAMA INVESTMENTS ARE THE SAME REFERRED TO ON LINE 1 OF THE FORM TITLED "PREMIUM TAX STATEMENT". THIS INFORMATION ALONG WITH SUPPORTING DATA LISTED IN DETAIL, THE INVESTMENTS 11 through 14 MUST BE FILED WITH YOUR ANNUAL STATEMENT

STATE OF New York
COUNTY OF New York

Paul D. Hales, Senior Vice-President and Controller, Secretary, and
A. Austin Lynes, Jr., Senior Vice-Pres., General Counsel & Secretary, Counsel of the
Metropolitan Life Insurance Company

being duly sworn each for himself, deposes and says that they are the above described officers of said company and that the foregoing statement of Alabama investments as of December 31, of such year, to the best information, knowledge and belief, respectively

[illegible] Vice-Pres. & Controller
[illegible] Sr. Vice-President, General Counsel & Secretary

Subscribed and sworn to before me this [illegible] day of February, 19 76.

[illegible]

(SEAL) My commission expires 3/18/76

NOTARY PUBLIC State of New York
No. 41-4514525 Qual. in New York County
Commission Expires March 30, 1976

TO ALL INSURANCE COMPANIES LICENSED IN THE STATE OF ALABAMA:

On January 1, 1972, the Alabama Insurance Code, Act No. 387, S. 198 (Regular Session, 1971) became effective. The Code provides for payment of the following additional fees:

Filing of Annual Statement.....$10.00

Filing of Amendment to Articles of Incorporation.....$ 5.00

Filing of Amendment to By-Laws.....$ 5.00

Such fees must accompany the materials, when filed. Please inform all personnel in your organization responsible for the filing of the materials of these requirements.

IMPORTANT NOTE Under the Retaliatory Provision of Section 27-3-29 of the Alabama Insurance Code, the following is in effect:

When by the laws of any other state the taxes, licenses and other fees, in the aggregate, are or would be imposed upon Alabama insurers, which are in excess of the taxes, licenses and other fees, in the aggregate, imposed by Alabama upon similar insurers of such other state, the same tax, licenses and other fees, in the aggregate, imposed by such state shall be imposed by the Commissioner of Alabama on insurers of such other state.

Please insert the information requested below and attach this form to the Alabama premium tax statement, or statements, to be filed with your application for renewal of company license.

Amount of tax which would be due your state by a similar Alabama insurer $434,734.62

Fee for filing of annual statement by an Alabama insurer _____

Fee for filing amendment to articles of incorporation of an Alabama insurer _____

Fee for filing amendment to by-laws of an Alabama insurer _____

Other fees imposed on an Alabama insurer _____



STATE OF ALABAMA

[redacted]

Life

| | | |
|---|---|---|
| Gross Amount of Direct premiums, less return premiums thereon | | $ 37,028,734 |
| Deductions: | | |
| Dividends to policyholders. | | 3,495,001 |
| Premiums subject to tax | | 33,533,473 |
| Tax at 1% | | $ 339,034.73 |
| Accident and Health | | |
| Gross amount of direct premiums, less return premiums thereon | | $ 12,795,441 |
| Deductions: | | |
| All dividends to policyholders. | | 3,295,448 |
| Premiums subject to tax | | 12,499,993 |
| Tax at 1% | | $ 124,999.93 |
| Total Tax - Life and Accident and Health | | $ 464,734.66 |

The State of New York imposes a net income tax upon the net income of companies domiciled in New York and elsewhere. This tax is not reflected in the retaliatory annual.

[illegible]

[illegible]

[illegible]

Metropolitan Title Insurance Company
Name of Company

New York — [illegible] — 10035
City — State — Zip Code

NOTE: EACH FIRE AND CASUALTY COMPANY MUST COMPLETE A SEPARATE TAX STATEMENT AND MUST USE OWN LINES AND FOR CASUALTY LINES. SEPARATE CHECK IN PAYMENT OF TAX MUST BE ATTACHED TO IT.

1. Total admitted assets ..... $ 80,417,107,335
2. Admitted assets in Alabama (enter zero if none) or attach a supplementary schedule ..... $ 485,041,097
3. Ratio: admitted assets in Alabama (enter 1 if total admitted assets (line 2) divided by line 1) ..... .0060165 %
Lines 4 through 7 need not be completed unless premiums are less than maximum applicable

4. Gross premiums, including policy and membership fees, collected in Alabama or received for business done in Alabama ..... $ 10,413,638
5. Reinsurance premiums received from companies not authorized to do business in Alabama ..... $ 0
6. TOTAL PREMIUMS (line 4 plus line 5) ..... $ 10,413,638
7. LESS—
(a) Dividends paid, credited, or set aside to policyholders in Alabama ..... $ 4,616,140
8. TOTAL DEDUCTIONS (line 7(a)) ..... $ 4,616,140
9. TOTAL TAXABLE PREMIUMS (line 6 minus line 8) ..... $ 10,413,638
10. Tax rate applicable based on percentages shown on line 3. If entered box was not a real estate tax rate is 2% for life companies and 4% for all other companies ..... 2.0 %
11. PRELIMINARY TAX DUE (line 9 multiplied by tax rate shown on line 10) ..... $ 208,272.76
12. Total annuity considerations received in Alabama or elsewhere for business done in Alabama including deposits received from companies not authorized to transact business in Alabama ..... $ 1,125,230
13. PRELIMINARY TAX DUE on annuity considerations (1% of line 12) ..... $ 11,252.30
14. GROSS PRELIMINARY TAX DUE (line 11 plus line 13) ..... $ 219,525.06
15. LESS—
(a) All salaries wages paid for any year next preceding filing of this return on real estate and improvements thereon in State of Alabama owned and in use 50% assigned to obligation for last period of such use only ..... $ -0-
(b) All franchise taxes paid under provisions of Section 40-14-40 or 40-14-41, Code of Alabama 1975, for the tax year preceding filing of this return ..... $ 3,125.83
(c) All overpayment of assessments or overpayment by Commissioner of Insurance of Alabama ..... $ 1,000.00
16. TOTAL DEDUCTIONS (Total of lines 14 (a), (b), and (c)). Copy of receipt or payment of taxes included herein must be attached to this statement ..... $ 4,125.83
17. NET PREMIUM TAX DUE (line 14 minus line 16) ..... $ 215,399.23

State of New York
County of [illegible]

Edward R. Leister, Vice-President and Controller [illegible] and
Barry R. Evans, Vice-President, Secretary and Associate General Counsel, [illegible] of the
Metropolitan Life [illegible] Insurance Company,
being duly sworn, each for himself, deposes and says, that they are the above described officers of said Company and that the foregoing statement of Gross[illegible] during said year and showing the true copies of same on December 31, of such year, is full and correct according to the best of their information, knowledge and belief, respectively.

[illegible] Vice-President &
[illegible]
[illegible] Secretary

Subscribed and sworn to before me this 28th day of February, 19 82.

[illegible]
[illegible]

My commission expires [illegible]



DEPARTMENT OF INSURANCE

STATE OF [illegible]
INVESTED BY
Section 27, Code of Alabama 1975.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] Metropolitan Life Insurance Company

| | New York | New York | 19 53 |
|---|---|---|---|
| | (State) | (State) | (Year) |

| | | |
|---|---|---|
| (1) | Real Estate in this State | $ [illegible] |
| (2) | Bonds as listed hereinafter owned by or other evidences of indebtedness of the State of Alabama, or of any political subdivision thereof, whether such bonds, issued on account of the form of securities of any political subdivision thereof whether such bonds, issued on account of the form of securities of any political subdivision thereof whether such bonds, issued on account of the form of securities of any political subdivision thereof

[illegible]

[illegible]

[illegible]

STATE OF ALABAMA
DEPARTMENT OF INSURANCE
MONTGOMERY, ALABAMA 36104

# APPLICATION FOR RENEWAL OF LICENSE OF INSURANCE COMPANY

TO THE COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA:

☐ Application is hereby made for renewal of license for the year beginning January 1, 19[illegible], for the same powers and/or lines of insurance as granted under the company's license issued for the prior year.

☐ Additional authority is being requested for: _____

(1) Name of Company Metropolitan Life Insurance Company

Home Office 1One Madison Ave., New York, New York 10010
(Street and Number) (City and State and Zip Code)

‡Principal Office in the United States _____
(Street and Number) (City and State and Zip Code)

‡United States Manager _____

Kind of insurance business to be transacted in the State of Alabama: Life, Accident and Sickness

(2) Enclosed herewith, find the following papers which have been properly executed.

Premium Tax Statement (form enclosed)

The following to be on Domiciliary State Forms:

(a) Convention Form Financial Statement.

(b) Certificate of Compliance.

(c) Certificate of Valuation of Life Policies (furnished by Commissioner of Insurance of Home State—Required of Life Companies only).

(d) Certificate of Deposit.

If not enclosed, explain omission on these lines: _____

(3) Enclosed herewith find the following remittances:

(a) Check for $[illegible] as payment of company license fee for each power. (Multiple lines [illegible])

(b) Check in payment of Premium Tax (Separate check must be sent covering premium tax on Fire and Allied Lines and Premium Tax on Casualty Lines)

If not enclosed, explain omission on these lines _____

(4) *Designation of our principal place of business in the State of Alabama. 3301 Peiriane Drive, Suite 100
(Street and Number)
Montgomery 36116
(City)
Montgomery
(County)

*Name of our authorized agent residing thereat. George E. Cowins, Jr.
(Name of Authorized Agent)

SEAL.

IN WITNESS WHEREOF, the said company has caused this application to be signed by its President or Vice-President and Secretary or Assistant Secretary, and attested by its corporate seal on this the 22nd day of February 19[illegible].

Stuart Graves [illegible] Vice-President

Secretary or Assistant Secretary

Harry P. Kamen, Vice President, Secretary & Assoc General Counsel

*Does not apply to companies organized under the laws of Alabama

NOTICE OF

PAYMENT UNDER WRITTEN PROTEST

STATE OF ALABAMA

It is the position of Metropolitan Life Insurance Company that in the taxation of foreign and domestic life insurance companies, the laws of the State of Alabama discriminate against foreign life insurance companies and in favor of domestic life insurance companies and that such discrimination is a denial of due process of law and of equal protection of the laws to foreign life insurance companies contrary to the guarantees of the Fourteenth Amendment to the Constitution of the United States. This issue is currently pending decision by the Supreme Court of the United States in the case of Western and Southern Life Insurance Company v. State Board of Equalization of the State of California, No. 79-1423. Accordingly, Metropolitan Life Insurance Company is paying its 1980 premium taxes to the State of Alabama under written protest and intends to bring suit or to take such other steps as may be necessary to protect its right to recover such taxes in the event discriminatory insurance tax laws are or may be held to be invalid.

METROPOLITAN LIFE INSURANCE COMPANY



RE: Stock Life Insurance Company

ALL INSURANCE COMPANIES LICENSED IN THE STATE OF ALABAMA:

On January 1, 1972, the Alabama Insurance Code, Act No. 307, H. 198 Regular Session, 1971) became effective. The Code provides for payment f the following additional fees:

Filing of Annual Statement.....$10.00

Filing of Amendment to Articles of Incorporation.....$ 5.00

Filing of Amendment to By-laws.....$ 5.00

uch fees must accompany the materials, when filed. Please inform all ersonnel in your organization responsible for the filing of the materials f these requirements.

MPORTANT NOTE Under the Retaliatory Provision of Section 27-3-29 of the labama Insurance Code, the following is in effect:

)n by the laws of any other state the taxes, licenses and other fees, in the aggregate, are or would be imposed upon Alabama insurers, which are in excess of the taxes, licenses and other fees, in the aggregate, imposed by Alabama upon similar insurers of such other state, the same tax, licenses and other fees, in the aggregate, imposed by such state shall be imposed by the Commissioner of Alabama on insurers of such other state.

Please insert the information requested below and attach this form to the Alabama premium tax statement, or statements, to be filed with your application for renewal of company license.

| | |
|---|---|
| Amount of tax which would be due your state by a similar Alabama insurer | 468,143.77 |
| Fee for filing of annual statement by an Alabama insurer | |
| Fee for filing amendment to articles of incorporation of an Alabama insurer | |
| Fee for filing amendment to by-laws of an Alabama insurer | |
| Other fees imposed on an Alabama insurer | |

METROPOLITAN LIFE INSURANCE COMPANY
RETALIATORY CALCULATION - 1955
NEW YORK STATE BASIS - 1954

Life

Gross Amount of Direct premiums, less return premiums thereon $ 37,063,901

Deductions:

Dividends to policyholders. $ 3,334,405

Premiums subject to tax $ 33,728,796
Tax at 1% $ 337,287.96

Accident and Health

Gross amount of direct premiums, less return premiums thereon $ 13,428,177

Deductions:

All dividends to policyholders. $ 2,312,596

Premiums subject to tax $ 11,115,581
Tax at 1% $ 111,155.81

Total Tax - Life and Accident and Health $ 448,443.77

The State of New York imposes a net income tax upon the net income of companies domiciled in New York and elsewhere. This tax is not reflected in the retaliatory amount.



# EXHIBIT 1

PREMIUM TAX STATEMENT
[illegible] INSURANCE COMPANY
For Business in Alabama for the Year Ending December 31, 1955

[illegible] Prudential Property and Casualty Insurance Company
Name of Company

Home State: [illegible] | Domiciled in: New Jersey | Organized: [illegible]
City | State | Date

NOTE: EACH FIRE AND CASUALTY COMPANY MUST COMPLETE A SEPARATE TAX STATEMENT FOR FIRE AND ALLIED LINES AND FOR CASUALTY LINES. SEPARATE CHECKS IN PAYMENT OF TAX MUST BE ATTACHED TO EACH.

1. Total admitted assets ... $ N/A
2. Admitted assets in Alabama as defined in accompanying schedule ... $ N/A
3. Percent admitted assets in Alabama (proportion of total admitted assets (Line 2 divided by Line 1). Companies whose Lines 1 through 3 need not be completed unless premiums tax rate less than maximum is applicable) ... N/A %
4. Direct premiums (exclusive of annuity considerations) received in Alabama or charged for business done in Alabama ... $ 2,151,091.17
5. Reinsurance premiums received from companies not authorized to do business in Alabama ... $ Not available
6. TOTAL PREMIUMS (Line 4 plus Line 5) ... $ 2,151,091.17
7. Less--
   (a) Premiums returned ... $ Included above
   (b) Dividends paid, applied, or left with company to accumulate at interest ... $ -0-
8. TOTAL DEDUCTIONS (Line 7(a) plus Line 7(b)) ... $ -0-
9. TOTAL TAXABLE PREMIUMS (Line 6 minus Line 8) ... $ 2,151,091.17
10. Tax rate applicable based on percentage shown on Line 3. If reduced tax rate is not applicable, tax rate is 2% for fire companies and 4% for all other companies ... 2 %
11. PREMIUM TAX DUE (Line 9 multiplied by tax rate shown on Line 10) ... $ 43,021.83
12. Total annuity considerations received in Alabama or charged for business done in Alabama (including annuities received from companies not authorized to transact business in Alabama) ... $ None
13. Less--
   (a) Premiums returned ... $ -0-
   (b) Dividends paid, applied, or left with company to accumulate at interest ... $ -0-
14. TOTAL DEDUCTIONS (Line 13(a) plus Line 13(b)) ... $ None
15. TAXABLE ANNUITY CONSIDERATIONS (Line 12 minus Line 14) ... $ None
16. PREMIUM TAX DUE on annuity considerations (1% of Line 15) ... $ None
17. GROSS PREMIUM TAX (Line 11 plus Line 16) ... $ 43,021.83
18. Less--
   (a) All valorem taxes paid for the year next preceding filing of this return on real estate and improvements located in State of Alabama owned and in use by company for company's full period of such tax year ... $ -0-
   (b) All license fees and taxes paid during year preceding filing of this return to any county in Alabama for privilege of engaging in business in accordance with such county ... $ -0-
   (c) All franchise taxes paid under provisions of Title 51, Section 847 or 848, Code of Alabama 1940, for the last year preceding filing of this return ... $ 400.00
   (d) All expenses of examinations of company by Superintendent of Insurance of Alabama ... $ 50.00
19. TOTAL DEDUCTIONS (Sum of Lines 18(a), (b), (c) and (d). NOTE: Copy of receipt in payment of these deductions must be attached to this statement) ... $ 450.00
20. NET PREMIUM TAX DUE (Line 17 minus Line 19) ... $ 42,571.83

STATE OF New Jersey }
COUNTY OF Monmouth } ss.

Elias S. Johnson, Vice President and Comptroller, President and
David E. Fredericks, Secretary of the
Prudential Property and Casualty Insurance Company,
being duly sworn, each for himself, deposes and says that they are the above described officers of said Company and that the foregoing statement of business transacted during such year and showing the true value of bonds as December 31, is in all respects, to the best of their information, knowledge and belief, respectively.

[illegible] Vice President
[illegible] Secretary

Subscribed and sworn to before me this 27 day of February, 1956.

[illegible]

(SEAL) My commission expires [illegible] Notary Public

STATE OF ALABAMA

INCOME TAX RETURN

For

For the Calendar Year or Fiscal Year Ending December 31, 19__

Name of Taxpayer

Address

City or Town

State

ZIP Code

FOR: EACH CORPORATION DOING BUSINESS WITHIN ALABAMA AND EACH CORPORATION WHICH OWNS PROPERTY LOCATED WITHIN THE STATE OF ALABAMA MUST FILE A RETURN ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF THE TAXABLE YEAR. A CORPORATION WHICH IS NOT REQUIRED TO QUALIFY TO DO BUSINESS IN ALABAMA BUT WHICH OWNS PROPERTY LOCATED WITHIN THE STATE OF ALABAMA MUST FILE A RETURN ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF THE TAXABLE YEAR. IF THE CORPORATION IS DISSOLVED, WITHDRAWN, OR MERGED, A RETURN MUST BE FILED WITHIN THIRTY (30) DAYS AFTER THE EFFECTIVE DATE OF SUCH DISSOLUTION, WITHDRAWAL, OR MERGER. IF THE CORPORATION CEASES TO OWN PROPERTY LOCATED WITHIN THE STATE OF ALABAMA, A RETURN MUST BE FILED WITHIN THIRTY (30) DAYS AFTER THE DATE OF SUCH CESSATION. ALL RETURNS MUST BE FILED WITH THE INCOME TAX DIVISION, MONTGOMERY, ALABAMA. ALL QUESTIONS MUST BE ANSWERED AND THE RETURN MUST BE SIGNED AND SWORN TO BY AN OFFICER OF THE CORPORATION. IF ADDITIONAL SPACE IS REQUIRED FOR ANY ITEM, ATTACH A SEPARATE SHEET.

1. Total allotted assets ..... $ XXX
2. Allotment ratio to Alabama (computed as directed on accompanying schedule) ..... % XXX
3. Percent allotted assets to Alabama (enter amount of total allotted assets (Line 2 divided by Line 1)) ..... XXX %
4. Gross premiums, assessments or annuity considerations received in Alabama or allotted to Alabama (See Instructions) ..... $ X,XXX,XXX.XX
5. Reinsurance premiums received from companies not authorized to do business in Alabama ..... $ XXX,XXX.XX
6. TOTAL PREMIUMS (Line 4 plus Line 5) ..... $ X,XXX,XXX.XX
7. Less—
   (a) Premiums returned ..... $ (Total paid claims)
   (b) Dividends paid, applied, or left with company to accumulate or interest ..... $ (XXX)
8. TOTAL DEDUCTIONS (Line 7(a) plus Line 7(b)) ..... $ (XXX)
9. TOTAL TAXABLE PREMIUMS (Line 6 minus Line 8) ..... $ X,XXX,XXX.XX
10. Tax rate applicable based on percentage shown on Line 3. (If applicable tax rate is not applicable, tax rate is 2% for life companies and 4% for all other companies) ..... X %
11. PREMIUM TAX DUE (Line 9 multiplied by tax rate shown on Line 10) ..... $ XX,XXX.XX
12. Total annuity considerations received in Alabama or elsewhere for business done in Alabama (including deferred fixed considerations and contributions to segregated funds) on contracts issued or delivered in Alabama ..... None
13. Less—
   (a) Premiums returned ..... $ _____
   (b) Dividends paid, applied, or left with company to accumulate or interest ..... $ _____
14. TOTAL DEDUCTIONS (Line 13(a) plus Line 13(b)) ..... None
15. TAXABLE ANNUITY CONSIDERATIONS (Line 12 minus Line 14) ..... None
16. PREMIUM TAX DUE on annuity considerations (1% of Line 15) ..... None
17. GROSS PREMIUM TAX (Line 11 plus Line 16) ..... $ XX,XXX.XX
18. Less—
   (a) All retaliatory taxes paid for the year next preceding filing of this return on net gains and organizations taxes in force in Alabama (attach sworn statement) ..... $ _____
   (b) All license fees and taxes paid during year preceding filing of this return to any county in Alabama for privilege of shipping a business of insurance written and effected ..... $ _____
   (c) All franchise taxes paid under provisions of Title 51, Section 147 or 148, Code of Alabama 1940, for the last year preceding filing of this return ..... $ _____
   (d) All expenses of examinations of company by Superintendent of Insurance of Alabama during ..... $ _____
19. TOTAL DEDUCTIONS (Total of Lines 18(a), (b), (c) and (d)). NOTE: Copy of receipt in payment of each item included herein must be attached to this statement. ..... $ XX,XXX.XX
20. NET PREMIUM TAX DUE (Line 17 minus Line 19) ..... $ _____

STATE OF New Jersey
COUNTY OF Monmouth

Milton S. Johnson, Vice President and Controller, Petitioner, a

Secretary of the Prudential Property and Casualty Insurance Company, that such entity, and that it has the above described officers of said Company, and that the foregoing statement of business transacted during such year and showing the true status of said as December 31, 19__, is full and correctly according to the best of their information, knowledge and belief respectively.

Subscribed and sworn to before me this 28 day of February, 19__.

My commission expires



ALLOTTED ASSETS IN ALABAMA, COMPUTED AS OF December 31, 19__, PURSUANT TO SEC. 40-2-1, CODE OF ALABAMA 1940, AS AMENDED, FOR USE IN DETERMINING PREMIUM TAX DUE

Prudential Property and Casualty Insurance Company

Name of Company

| | Allotted | Non-Allotted | Total |
|---|---|---|---|
| | (a) | (b) | (c) |
| 1. (a) Real Estate in this State | | | $ XXX |
| 1. (b) Bonds or shares of stock of any corporation, association or other evidence of indebtedness of the State of Alabama, or of any county, city, town, village or other subdivision thereof, and bonds, debentures or other evidences of indebtedness of any corporation organized under the laws of the State of Alabama, or of any political subdivision thereof, and bonds issued by authority of the State of Alabama or of any political subdivision thereof, and bonds issued by authority of any act of the Congress of the United States, and bonds or other evidences of indebtedness of any corporation organized under the laws of the United States or any state, territory or possession thereof, which shall have been actually held by the company for a period of at least one year prior to the date of the statement | | | $ XXX |
| 1. (c) Bonds, bonds or other evidences of indebtedness of any foreign or international authority, agency, bank or other institution not payable exclusively in Alabama currency, held by the Bank of Alabama, as Trust, Loan or Investments and authorized | | | $ XXX |
| 1. (d) Shares of stock issued by, mortgages or other loans and assets of or investments in any stock shares in the State of Alabama | | | $ XXX |
| 1. (e) Shares, bonds, debentures, notes or other evidences of indebtedness of any corporation organized under the laws of the State of Alabama | | | $ XXX |
| 1. (f) Bonds, bonds or other evidences of indebtedness secured by mortgage or other lien upon real estate situated in the State of Alabama and insured or guaranteed, in whole or in part, by the United States or any person, association or corporation organized under the laws of the United States or any agency or instrumentality thereof authorized and empowered to insure or partially guarantee or guaranty | | | $ XXX |
| 1. (g) Collateral loans to Alabama residents or to others, where at least one-half of the value of the collateral are pledged securities on Alabama investments as aforesaid applied | | | $ XXX |
| 1. (h) Cash deposits in regularly incorporated national or state banks in this State on the basis of the average monthly deposits throughout the calendar year | | | $ XXX |
| (i) Loans secured by policies on the lives of residents of the State of Alabama | | | $ XXX |
| (j) Shares or share accounts of building and loan associations organized under the laws of the State of Alabama or in the shares or share accounts of National savings and loan associations having their principal office in the State of Alabama | | | $ XXX |
| (k) Bonds, bonds, notes, debentures or other evidences of indebtedness of any corporation organized under the laws of any other state of the United States in the second step the agents of such corporation licensed to do business in Alabama, but the total assets of the corporation issuing such bonds, bonds, or other evidences of indebtedness | | | $ XXX |
| (l) Cities, towns, bonds or other evidences of indebtedness issued by school districts, public corporations or municipalities organized in the State of Alabama, which have been issued by the Alabama Public School and College Authority | | | $ XXX |
| (m) That percentage of the ordinary premiums for life and Annuities shown here to direct all policies of the United States of America to the total premiums received by the company for business of subject's bonds, bonds or to the premiums, or investments written in the State premiums received by the company | | | $ XXX |
| | (a) Total premiums received | $ _____ | |
| | (b) Direct premiums received in Alabama | $ _____ | |
| | (c) Percentage of Alabama premiums to total premiums | _____ % | |
| | (d) Investments in direct obligations of United States Government | $ _____ | |
| | (e) Amount to be included as Alabama investments (Line (b) (c) multiplied by Line (d)(c)) | | $ XXX |
| (n) Total of Lines 1 through (m) | | | $ XXX |

THE ASSETS LISTED HEREINABOVE ASSETS TO BE ALLOCATED ARE THOSE LAWFUL INVESTMENTS AND THOSE LOANS REPRESENTED FOR THE USE OF THE PUBLIC POLICY OBJECTS THAT ACCOMPANY. THESE INVESTMENTS, ASSETS WITH ACCOMPANIED, EXCEPTS SUBMITTED BY DETAIL THE INVESTMENTS THROUGH THE ASSET BE FILED WITH THESE ANNUAL STATEMENTS

STATE OF Ohio
COUNTY OF Franklin

Milton S. Johnson, Vice President and Controller, Petitioner, and

Secretary of the Prudential Property and Casualty Insurance Company, that such entity, and that it has the above described officers of said Company, and that the foregoing statement of business transacted during such year and showing the true status of said Company as December 31, 19__, is full and correctly according to the best of their information, knowledge and belief respectively.

Subscribed and sworn to before me this 28 day of February, 19__.

My commission expires

Notary Public

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY
[illegible], NEW JERSEY 07733

TAX COMPUTATION ON THE NEW JERSEY BASIS FOR 1977 PREMIUMS IN ALABAMA

| PREMIUM TAX | GROUP A & H | W.C. | ALL OTHER |
|---|---|---|---|
| NET DIRECT PREMIUMS [illegible] | $ 0.00 | $ 0.00 | $ 3,156.0[illegible] |
| PLUS- DIVIDENDS TO POLICYHOLDERS | $ 0.00 | $ 0.00 | $ |
| TAXABLE PREMIUMS | $ 0.00 | $ 0.00 | $ 3,156,0[illegible].9[illegible] |
| TAX RATE | 0.01900 | 0.02250 | 0.02000 |
| TAX | $ 0.00 | $ 0.00 | $ 63,120.93 |
| TOTAL TAX ON NEW JERSEY BASIS | | | $ 63,120.93 |

PLUS- ASSESSMENT FOR AUTOMOBILE UNSATISFIED CLAIM AND JUDGMENT FUND EXPENSE

| 5120-1240 [illegible] 12-1.5 [illegible].2 CESS- AUTO MEDICAL | RATE | |
|---|---|---|
| $13,867.00 | 0.990666 | $ 141.92 |

PLUS- ASSESSMENT FOR COST OF ADMINISTRATION OF MOTOR VEHICLE SECURITY-RESPONSIBILITY LAW

| 5120-1240 [illegible] 12-1.5 [illegible].2 CESS- AUTO MEDICAL | RATE | |
|---|---|---|
| $ 993,857.00 | 0.004998 | $ 2,965.60 |
| TOTAL TAX AND ASSESSMENTS ON NEW JERSEY BASIS | | $ 66,228.45 |

# AMICUS CURIAE

# BRIEF

Office Supreme Court, U.S.
FILED
AUG 15 1984
ALEXANDER L. STEVAS
Clerk

No. 83-1274

IN THE

# Supreme Court Of The United States

October Term, 1983

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
*Appellants,*

*-v.-*

W. G. WARD, Jr., et al.,
*Appellees.*

On Appeal From The Supreme Court Of Alabama

## BRIEF *AMICI CURIAE*, IN SUPPORT OF APPELLEES, SUBMITTED BY THE FLORIDA ASSOCIATION OF DOMESTIC INSURANCE COMPANIES, INC., THE ASSOCIATION OF OKLAHOMA LIFE INSURANCE COMPANIES, THE ASSOCIATION OF SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE COMPANIES AND THE ASSOCIATION OF SOUTH CAROLINA LIFE INSURANCE COMPANIES

ROBERT W. PERKINS*
SAMUEL R. NEEL, III
PERKINS & COLLINS
Post Office Drawer 5286
Tallahassee, Florida 32301
(904) 224-5511

*Attorney for the Florida Association of Domestic Insurance Companies, Inc., The Association of Oklahoma Life Insurance Companies, The Association of South Carolina Property and Casualty Insurance Companies, and The Association of South Carolina Life Insurance Companies*

August 14, 1984
*Counsel of Record

BEST AVAILABLE COPY

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## QUESTION PRESENTED

Whether appellants have carried their heavy burden of negativing every conceivable legitimate state purpose for the Alabama premium tax statute.

No. 83-1274

IN THE

# Supreme Court Of The United States

October Term, 1983

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
*Appellants,*

-v.-

W. G. WARD, JR., et al.,
*Appellees.*

On Appeal From The Supreme Court Of Alabama

## BRIEF *AMICI CURIAE*, IN SUPPORT OF APPELLEES, SUBMITTED BY THE FLORIDA ASSOCIATION OF DOMESTIC INSURANCE COMPANIES, INC., THE ASSOCIATION OF OKLAHOMA LIFE INSURANCE COMPANIES, THE ASSOCIATION OF SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE COMPANIES AND THE ASSOCIATION OF SOUTH CAROLINA LIFE INSURANCE COMPANIES

This brief in support of appellees is submitted in accordance with Rule 36.2 of the Rules of this Court with the written consent of the appellants and appellees on file with the Clerk of this Court.

## INTEREST OF *AMICI CURIAE*

### THE FLORIDA ASSOCIATION OF DOMESTIC INSURANCE COMPANIES, INC.

The Florida Association of Domestic Insurance Companies ("Association") is an association of life, health, and

property and casualty companies consisting of 36 companies. The Association has been in existence for six years and has many companies which are licensed in several states, with some licensed in all 50 states.

Florida and 31 other states provide some type of tax incentive to encourage domestic companies to locate within their state. In Florida, the incentive has attracted a large number of new companies. In 1977, Florida had 75 domestic companies (See *Department of Insurance Report*, Fiscal Year ending in 1977). Currently, Florida has 110 domestic companies and is still growing. This growth must be attributed in large part to the favorable tax climate in Florida.

In addition, Florida provides a tax advantage to foreign companies which locate a regional office in the State. This has brought several regional offices, hundreds of new jobs and a consumer pricing market where competition is extremely keen.

Florida has a smorgasbourd of tax incentives and tax exemptions. Florida's domestic companies pay the State's corporate income tax while foreign companies subtract such taxes from their premium tax, further reducing any tax differential. In certain lines of insurance, such as annuities, there is no preferential treatment between domestic or foreign companies.

The body of law regulating taxes by various states has developed over many years. Those changes in Florida corrected certain inequities, offered incentives for certain lines of insurance when the local needs were not being met (such as the special tax offsets on workers compensation coverages and annuities) and at the same time offered an incentive to expand the insurance market in Florida on those coverages and companies that need encouragement.



Florida is proud that favorable tax treatment does not create a barrier to interstate business. Even with the current growth of new companies, Florida's domestics write only 8% of workers compensation in the state, less than 5% of the other property and casualty lines. While the life and health companies have a larger market share than the property and casualty companies, foreign companies still write the largest volume of all lines of insurance in Florida. Sales have increased each year as the chart below indicates, further illustrating that there is no barrier to interstate business in this State.

**GROWTH OF INSURANCE FIGURES WITH PERCENTAGE INCREASE OVER PREVIOUS YEAR**

| | 1981 | 1982 | Total Percent Increase 1981-1982 | Percent Increase 1981-1982 |
|---|---|---|---|---|
| Direct Writings. | | | | |
| All lines | $ 1,926,102,943 | 9,685,127,475 | 615.28 | 9.71 |
| Life Insurance in Force (Florida) | | | | |
| Florida Life Insurance | 22,644,992,157 | 167,511,931,565 | 639.73 | 12.26 |
| Premiums & considerations for annuities | 680,533,548 | 2,586,541,597 | 458.69 | 17.70 |
| Accident & Health Direct Writings | 290,473,676 | 2,516,926,288 | 766.29 | 9.66 |
| Fire & Casualty Direct Writings | 551,695,997 | 4,582,258,792 | 694.53 | 6.66 |

*Less Fraternal Business

Source: *Report of the Department of Insurance State of Florida* Fiscal year ending June 30, 1983

## THE ASSOCIATION OF OKLAHOMA LIFE INSURANCE COMPANIES

The Association of Oklahoma Life Insurance Companies ("Association") is an association of legal reserve life insurance companies domiciled in the State of Oklahoma. The Association has a constituency of 20 legal reserve life insurance companies; its member companies include all of the larger domestic life insurance companies as well as all of the larger domestic writers of accident and health insurance, excluding the Blue Cross and Blue Shield which is not eligible for membership but does have a legal reserve life insurance company subsidiary as a member.

In 1958, Oklahoma had 20 legal reserve life insurance companies as well as some 10 Mutual Benefit Associations and 9 property and casualty insurers. At the end of 1987, according to the Oklahoma Insurance Commission, Oklahoma had 92 life insurance companies and 54 property and casualty companies for a total of 146 domestic companies.

The number of domestic companies is continuing to grow. There is no doubt that this growth is due to the favorable tax climate in Oklahoma as was manifested in affidavits filed by certain intervenors in the lawsuit brought in 1981 by the Prudential Life Insurance Company and others against the Insurance Commissioner of Oklahoma concerning the differential in the premium tax between domestic and foreign insurers.

The premium tax advantage for domestic Oklahoma companies does not attain unless the company maintains a home office in the state that performs certain specific functions delineated by statute. Moreover, a foreign company may abate the premium tax by investing a certain percentage of their assets in Oklahoma Securities. A domestic company that does not meet the qualifications of the home



office requirement may also abate their taxes under this same provision of the law. Domestic companies that are exempt from the premium tax are required to pay corporate tax in Oklahoma. Foreign companies are relieved of the payment of corporate taxes (both franchise and income tax) regardless of whether they have abated the premium tax by investment. Annuities written by foreign companies are exempt from the premium tax. This constantly changing body of law that provides incentives has been responsible for the past and continuing location in Oklahoma of insurance companies, especially Legal Reserve Life Insurance companies, which is very important because it attracts capital to a capital poor state like Oklahoma.

## ASSOCIATION OF SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE COMPANIES AND THE ASSOCIATION OF SOUTH CAROLINA LIFE INSURANCE COMPANIES

The Association of South Carolina Property and Casualty Insurance Companies is an association formed in 1960 whose membership (all domestic, property and casualty insurance companies) are all headquartered in South Carolina. A number of the member companies have multi-state operations. Several are licensed to do business in all fifty states and the District of Columbia.

The Association of South Carolina Life Insurance Companies was founded in 1956 and is comprised of 16 life insurance companies domiciled in South Carolina with several of them doing business in States other than South Carolina.

The member companies have major investments in South Carolina. The home office buildings, and other property of the member companies and the employees of the member companies with the attendant payroll greatly

contribute to the growth, strength and stability of the State.

In South Carolina, foreign insurers are required to pay:

1. A 2% premium tax reduced in increments of .25% to 1% if:

   (a) 25%-100% of life reserves or 25%-100% of property and casualty premiums are invested within the state in specified securities.

2. An additional 1% premium tax.

Domestic insurers are required to pay:

1. A 2% premium tax not to exceed 5% of "... actual net income as determined under the provision of Chapter 7 of Title 12 ...."

A foreign insurer, fully investing in South Carolina, would pay 2%. A domestic insurer whose net profit exceeded 2% of premiums written in South Carolina, would also pay 2%. A domestic insurer, earning no net income, would not pay a premium tax, while an unprofitable foreign insurer would pay a maximum of 5% of premiums, reduced to 2% if fully invested.

Two factors have a bearing on the differential -- foreign insurers' investments in South Carolina and the net income of domestic insurers. Obviously, the state law has at least two purposes -- to promote investments in South Carolina by foreign insurers and to limit the taxation of domestics to 5% of net profits. The most significant factor is the denial of the alternative tax to foreign insurers.

This, however, is a post-result factor and applies only after the operating results are determined. Both classes of insurers can compete for business on an equal footing. In a down-cycle, where no profit is generated, a domestic insurer is favored to the extent that it knows it will lose less (everything else being equal).



Both foreign and domestics can compete subject to the same tax burden, provided the foreign insurer invests appropriately in South Carolina. It is only if the domestic insurer is unprofitable does it have an advantage over the foreign insurer.

## SUMMARY OF ARGUMENT

This Court in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981) set forth the two part test to be applied to the Alabama law challenged in this case: (1) Does the law have a legitimate purpose; and (2) Was it reasonable for a legislature to believe that the challenged classification in the law would promote that legitimate purpose.

Many legitimate State interests have been given for Alabama's law. There are others which could be given and the list is and should be voluminous since if there is any conceivable basis for the law, the law must be found constitutional. This is a broad test and much of the judicial labor is completed when this is adopted and applied. Of much significance is the fact that this Court in *Western & Southern* recognized that maintaining the profit level of a domestic industry and helping the reputation of a domestic industry so that it can better compete in the interstate market are legitimate State interests.

The only real test to be applied in this case is the one set forth in *Western & Southern*. This test embodies the rational basis test. A number of the courts in the past have not applied this test but have substituted their judgment for that of the legislature.

This is what the Florida Supreme Court did in the case of *Department of Rev. v. Amerep. Corp.*, 358 So.2d 1343 (Fla. 1978), a case cited by the Appellants as supporting

their position in this case. That decision was decided before *Western & Southern* and is of no authoritative value in light of that decision of this Court. This substitution of judgment completely negates the test and is what the foreign insurers are attempting to do in this case.

The Appellants claim that they agree with the test in *Western & Southern*, but then take the position that there is no legitimate State purpose because the law denies them equal protection. They therefore go to the desired conclusion – that the law denies equal protection – and then return to the first part of the test and say that there is no legitimate State purpose because the law denies equal protection.

In doing so, they do not really follow *Western & Southern*. Instead, they rely primarily on decisions of this Court in the past dealing with ad valorem taxes, or on decisions relying on the Commerce Clause, or on conflicting cases which the decision of this Court in *Western & Southern* attempted to harmonize into a uniform test. All of these cases are either distinguishable or of no import after the *Western & Southern* decision.

As for the second part of the test in *Western & Southern*, the Appellants have stipulated that the Alabama legislature could have reasonably believed that Alabama's premium tax statute would promote any of the purposes which the lower Alabama courts have determined to be legitimate. Regardless, the Appellants would not prevail because whether you are talking about the first or second part of the test, the Equal Protection Clause is satisfied if the State legislature rationally could have believed that the statute in question would promote its objective, and if the question is at least debatable. Alabama's statute has a rational relationship with the promotion of domestic industry in



Alabama, an objective this Court has recognized as legitimate, and with other legitimate state purposes, because it is obvious on the face of the statute that it encourages investment by foreign insurance companies in Alabama assets, encourages the formation of insurance companies in Alabama, and it raises revenue, all of which are logically promoted by this statute.

## ARGUMENT

In *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), this Court held that a state may not impose more onerous taxes on foreign corporations than those imposed on domestic corporations unless such discrimination bears a rational relation to a legitimate state purpose. This Court then set forth the following two part test for determining whether a classification challenged as being discriminatory is rationally related to the achievement of a legitimate state purpose:

> (1) Does the challenged legislation have a legitimate purpose? and
> (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

451 U.S. 648, 672.

The Appellants pay lip service to this test. However, the essence of much of Appellants' argument, relying on some of this Court's opinions prior to the *Western & Southern* decision, is that Alabama does not have a legitimate state interest in its law because the law violates the Equal Protection Clause. This begs the question and is not only circular reasoning, but also short circuits the circle. Appellants, while seemingly applying the test, jump to the conclusion that the Equal Protection Clause has been vio-

listed and then go back to the first part of the test -- is there a legitimate state interest -- and conclude there is not because they say the Equal Protection Clause has been violated. This is spurious reasoning because whether there is a legitimate state interest is the beginning of the application of the test not the end.

During the application of the *Western & Southern* test in the lower courts, many legitimate state interests were given for Alabama's premium tax law [Joint Appendix, Volume I, pp 27-51]; Florida in its law, lists similar but not identical purposes. Oklahoma and South Carolina in their premium tax statutes do not list such purposes, but this is not significant because the applicable equal protection test is not restricted to purposes listed in a statute.

In fact, none of these lists of legitimate state interests are either exclusive or all inclusive because:

> [I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it [cites omitted].

*Madden v. Kentucky*, 309 U.S. 83, 88.

It is also significant that this Court has recognized in *Western & Southern* that there is no doubt that state efforts to maintain the profit level of a domestic industry [citing *Parker v. Brown*, 317 U.S. 341, 363-367 (1943)] and efforts directed toward helping the reputation of a domestic industry so that it can better compete in the interstate mar-



ket [citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970)] are legitimate state interests. 451 U.S. at 671. This Court in that decision also acknowledged the assumption that each State Legislature is motivated in part by a desire to promote the interests of the domestic insurance industry in each state. 451 U.S. at 672.

One strong justification for such interests is illustrated in the medical malpractice area in Florida where a crisis occurred in 1975 which was caused primarily by the withdrawal from the market of a foreign insurance company leaving many doctors with no place to obtain affordable malpractice insurance. The same potential exists today due to the tendency of foreign insurance companies to want to come into the market to obtain the premium dollars and then withdraw when the losses come to fruition. At present, the only real solutions to this continuing problem are being provided by Florida domestic companies who have a greater commitment to the State. This is an excellent example of why the fostering of domestic insurance companies is and should be a legitimate state interest.

The standard of *Madden v. Kentucky*, supra, has not always been adhered to by other courts. A prime example is the Florida Supreme Court in the opinion of *Department of Rev. v. Amerop Corp.*, 358 So.2d 1343 (Fla. 1978), a decision cited by Appellants as holding that a Florida domestic preference tax was invalid because it violated the Equal Protection Clause (Appellants' Brief, p. 21).

In that case, a decision rendered before the *Western & Southern* opinion, the Florida Supreme Court did overturn a State statute which exempted from an intangible, personal property tax the intercompany accounts receivable of "affiliated groups" of corporations whose parent corporations were either incorporated in Florida or had their principal place of business in Florida, an exemption not avail-

able to "affiliated groups" of corporations whose parent corporations were not so situated. That Court acknowledged that the State of Florida was relying upon the principle that in taxation matters states have broad latitude in creating classifications without violating the Equal Protection Clause [citing, *inter alia*, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) and *Madden v. Kentucky*, 309 U.S. 83 (1940)], and upon the heavy burden which has to be met in asserting the unconstitutionality of a statutory scheme. Then that Court went on to say:

> The pole star for judging the validity of a particular classification is whether that classification 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [cites omitted].

358 So.2d at 1349.

However, the pole star in the case *sub judice* for evaluating Alabama's statutes on premium taxes is the test set forth in *Western & Southern*, supra. The Court in *Department of Rev. v. Amerep Corp.*, supra, in contrast to that case and purporting to rely on this Court's decisions in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959); and *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), formulated this test:

> [W]here a nonresident makes a challenge to a state's tax scheme it must first be determined whether the classification discriminates against the nonresident in such fashion as to unduly impinge upon our system of federalism which the Equal Protection Clause is intended to foster and protect along with the Commerce Clause and the Privileges and Immunities Clause. If no such impediment is found, the traditional test of a rational basis for the classification must then be applied. If the tax scheme fails to pass muster under either test, the statute must fall [cites omitted].

358 So.2d at 1353.



In adopting and applying this test, that Court misapplied the traditional rational basis test, rejected the bases for the law put forth by the State and substituted its judgment for that of the Florida Legislature. That Court, relying on the concurring opinion in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), also espoused the view that the Equal Protection Clause should be an instrument of federalism, a position acknowledged by this Court in *Western & Southern* as not having been adopted as the position of this Court.

The fallacy of the reasoning of the Florida Supreme Court in that decision is illuminated by a later opinion of the Florida Supreme Court in *In Re Estate Of Greenberg*, 390 So.2d 40 (Fla. 1980), and the dissent in that opinion. In that case, the majority upheld a Florida law which precluded a non-resident from acting as a co-personal representative of an estate whereas he could have qualified to act as a personal representative if he had been a resident of Florida. The majority applied the rational basis or minimum scrutiny test stated as follows:

> [1] The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity. Rather, the statutory classification to be held unconstitutionally violative of the equal protection clause under this test must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary. [cites omitted]

390 So.2d at p. 42. The majority later said that in using this test, the Equal Protection Clause was not violated just because a classification in a statute is not perfect and that "a statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it." [cite omitted]. 390 So.2d at p. 46.

The dissenting opinion in *In Re Estate Of Greenberg*, supra, joined in by two of the justices who were part of the court which decided *Department of Rev. v. Amrep Corp.*, supra, agreed that the minimum scrutiny test should be applied but felt that the law which excluded non-residents such as in that case from serving as personal representative was too arbitrary and irrational. This was because the dissent concluded that two of the interests maintained by the state to justify the statute were unpersuasive and that the third one, although plausible, could not prevail because of no rational relationship between the statute and the third interest. 390 So.2d at pp. 49-50. This philosophy of the dissenting justices of substituting their judgment for that of the Legislature is exemplified by its statement that:

> A close personal advisor, such as Pincus [the non-resident petitioning to act as co-personal representative] was to Greenberg [the deceased], is a far more rational choice by the decedent than the choice of remote stranger which the statute would allow.

390 So.2d at 51.

Such substitution of judgment by the justices nullifies the minimum scrutiny test and puts in its place personal preference. *Schweiker v. Wilson*, 450 U.S. 221, 234-35 (1981). Where the question is at least debatable, it is error for a court to substitute its judgment for that of the legislature because it is up to the legislature not the court to decide on the wisdom and utility of legislation. *Minnesota*



*v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, supra.

Appellants here engage in the same fallacious reasoning. They say that they agree with the test set forth in *Western & Southern*, but then they ignore it and rely on cases such as decisions of this Court dealing with ad valorem taxes decided prior to *Western & Southern* [*WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968); *Reserve Life Ins. Co. v. Bowers*, 380 U.S. 258 (1965) (*per curiam*); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)], or on decisions based on the Commerce Clause [*Southern Railway Co. v. Green*, 216 U.S. 400 (1910); *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921)], or on cases such as *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926) which also relied on *Southern Railway Co. v. Green*, supra, and which conflicted with other earlier decisions of the United States Supreme Court, which conflict this Court was attempting to resolve in the *Western & Southern* decision. The decision in *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535 (1934), also fits in this latter category and is further distinguishable in that it is a situation where a statute was held unconstitutional as applied but not necessarily on its face (the foreign insurers here are arguing for a *per se* rule), and is a case where the real discrimination was between different foreign insurance companies rather than between foreign insurance companies and domestic insurance companies.

As this Court clearly explained in *Western & Southern*, the Commerce Clause does not apply. Also, the cases such as those dealing with ad valorem taxes should not be relied on because the test is the one set forth in *Western & Southern* and that test should be the starting point, not the end

point, of any analysis of Alabama's or any other State's premium tax law.

As for the second part of the test in *Western & Southern* – whether it was reasonable for the lawmakers to believe that use of the challenged classification would promote the legitimate State purpose – the Appellants have stipulated that the Alabama Legislature could have reasonably believed that Alabama's premium tax statute's use of the classification of foreign versus domestic insurance companies would promote any of the purposes which the lower Alabama courts have determined to be legitimate (J.S. App., p. 2a). Regardless, the Appellants would not prevail upon the second part of the test because this Court has held in *Western & Southern* that the Equal Protection Clause is satisfied if the State Legislature rationally could have believed that the statute in question would promote its objective, 451 U.S. at p. 672, and that legislation will not be overturned under the Equal Protection Law if the question is at least debatable, 451 U.S. at p. 674.

Therefore, whether a court is dealing with the first or second part of the test set forth in *Western & Southern*, the test is a broad one and much of the judicial labor is defined and is in the advanced stage of analysis when the rational basis test is applied to a particular State statute. As a result, where a statute such as Alabama's has many possible legitimate State purposes and where this Court has acknowledged that the promotion of a domestic industry is a legitimate State purpose, it is quite clear and it follows logically from a review of the Alabama statute that on its face it has a rational relationship with the promotion of legitimate state purposes, including the legitimate State purposes for the statute adopted by the lower courts in Alabama – (1) encouraging investment by foreign insurers in



Alabama assets; (2) encouraging the formation of insurance companies in Alabama; and (3) the raising of revenue.

## CONCLUSION

For all of the above reasons, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have on this the 14th day of August, 1984, in accordance with Rule 28.5 and 28.5 of the Rules of the Supreme Court of the United States, duly served the foregoing brief of Amici Curiae upon the following, mailed by United States mail, first-class postage prepaid, and properly addressed to the following counsel of record at the following addresses, and I further certify that with such service all parties required to be served have been served:

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# APPELLEE'S

# BRIEF

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IN THE

# Supreme Court Of The United States

October Term, 1983

METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
*Appellants,*

vs.

W. G. WARD, JR., *et al.*,
*Appellees.*

On Appeal from the Supreme Court of Alabama

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## QUESTION PRESENTED

Have Appellants met their heavy burden of proving the lower courts erred in holding that Appellants failed to negative every conceivable legitimate state purpose of the Alabama premium tax statute?

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No. 88-1274

IN THE

# Supreme Court Of The United States

October Term, 1988

METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
*Appellants,*

vs.

W. G. WARD, JR., *et al.*,
*Appellees.*

On Appeal from the Supreme Court of Alabama

## BRIEF FOR APPELLEE/INTERVENORS

### STATEMENT

Appellants are insurance companies whose states of incorporation and principal places of business are outside the State of Alabama. Appellants are classified as "foreign insurers" under the provisions of §§27-4-1 (2) and 27-4-4, ALA. CODE (1975).[1] Insurance companies which are organized under the laws of the State of Alabama and which maintain their principal offices and chief places of business in the State of Alabama are classified as domestic insurers under the provisions of §§27-4-1 (3) and 27-4-3. Domestic insurers are subject to a lower premium tax rate than are foreign insurers pursuant to these statutes.

[1] Unless noted to the contrary, all code citations refer to ALA. CODE (1975).

Appellants filed Notices of Appeal to the Circuit Court of Montgomery County, Alabama from the refusal of the Alabama Commissioner of Insurance (hereinafter "Commissioner") to grant them a refund of premium taxes paid based on Appellants' allegation that the premium tax statute was unconstitutional. Therein, Appellants alleged that as "foreign insurers" they were unconstitutionally required to pay a premium tax at a higher rate than domestic insurers and that, therefore, §§27-4-4 and 27-4-5 unconstitutionally violated the Equal Protection guarantees of the United States Constitution because the statute differentiates between foreign and domestic insurers. The thirty-nine separate suits of Appellants before the trial court were consolidated.

Appellees American Educators Life Insurance Company, Booker T. Washington Life Insurance Company, Federated Guaranty Life Insurance Company, Liberty National Life Insurance Company, and Southern United Life Insurance Company (hereinafter collectively referred to as "Appellee/Intervenors"), domestic insurers under the subject statutes, filed a motion to intervene as defendants. The motion was granted.[2]

Appellants, Commissioner, and Appellee/Intervenors filed cross motions for summary judgment in two of the thirty-nine cases. The parties agreed the decision regarding the two cases would be dispositive of the remaining cases. Affidavits were filed in support of each and the motions were argued orally.

The trial court entered judgment in favor of Commissioner and Appellee/Intervenors, finding that the chal-

[2]Pursuant to Rule 28.1 of the Rules of this Court, the corporate parents, subsidiaries and affiliates of Appellee/Intervenors were listed in the Supplemental Appendix to the Motion to Dismiss or Affirm of Appellee/Intervenors at 1a-4a.



lenged legislation had legitimate purposes and that it was reasonable for the Alabama Legislature to believe the differentiation between foreign and domestic insurers would promote those purposes. Jurisdictional Statement Appendix (hereinafter "J.S. App.") at 21a.

Appellants filed a Motion for New Trial or, in the Alternative, Motion to Amend or Vacate the Judgment and a separate Motion to Extend the Findings of Fact. The motions were denied. An appeal was taken to the Alabama Court of Civil Appeals. The appellate court affirmed the trial court's ruling on the legitimate state purpose issue but remanded the case for an evidentiary hearing on the rational relationship issue on the ground that a conflict in the evidence below rendered summary judgment inappropriate. J.S. App. at 9a, 12a.

Commissioner and Appellee/Intervenors petitioned the Alabama Supreme Court for review of the remand order. Appellants petitioned for review of the legitimate state purpose issue. On September 23, 1983, the Supreme Court of Alabama denied all the petitions for certiorari. Thereafter, Appellants waived their right to a hearing and joined in a joint motion with all other parties seeking a rehearing and the entry of a final judgment. The motion was granted on November 10, 1983. J.S. App. at 1a-3a. On April 16, 1984, this Court noted probable jurisdiction.

## SUMMARY OF ARGUMENT

### I.

This Court in *Western & Southern Life Insurance Company* vs. *State Board of Equalization*, 451 U.S. 648 (1981), upholding a retaliatory tax against foreign insurers doing business in California, specifically held that states may differentiate between foreign and domestic corporations by

imposing "more onerous taxes" on foreign corporations if "the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose". 451 U.S. at 668. Normally there are three Constitutional provisions pursuant to which a taxpayer may challenge an allegedly discriminatory state tax – *i.e.*, the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause.

However, in *Western & Southern* this Court held that if the tax only involves insurance companies, Commerce Clause and Privileges and Immunities Clause considerations are precluded. The Commerce Clause is inapplicable to the business of insurance pursuant to the McCarran-Ferguson Act.[3] The Privileges and Immunities Clause is inapplicable to corporations. *Id.* at 655-56. Therefore, the Equal Protection Clause is the only available avenue for challenging a state tax which discriminates between foreign and domestic insurers. *Id.*

This Court then provided that a rational basis test should be applied in determining the constitutionality of a tax such as the one at issue. The test was described as follows:

> In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged classification have a legitimate purpose?, and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

*Id.* at 668.

[3]Indeed, this Court specifically rejected the plea of appellants in *Western & Southern* that the McCarran-Ferguson Act does not permit "anti-competitive state taxation that discriminates against out-of-state insurers". *Id.* at 653-54. Therefore, the impact on interstate commerce of a tax which discriminates against foreign insurers is not germane to the question of the constitutionality of taxing statutes such as the one at issue.



Indeed, if the rationality of the means to the legitimate end is even debatable, the legislature's judgment is to be affirmed and the challenger's attack must fail. The burden is upon those challenging the classification to negative every conceivable basis which might support it and to demonstrate that it would have been irrational for the legislature to believe that the subject statute could have accomplished any of the possible legitimate purposes. *Western & Southern*, 451 U.S. at 674; *Minnesota vs. Clover Leaf Creamery Company*, 449 U.S. 456, 464, *reh'g denied*, 450 U.S. 1027 (1981); *Vance vs. Bradley*, 440 U.S. 93, 97 (1979).

Of course, equal protection does not require an iron rule of equal taxation. To the contrary, broad discretion is reposed in the legislative body. *Lehnhausen vs. Lake Shore Auto Parts Company*, 410 U.S. 356 (1973); *Madden vs. Kentucky*, 309 U.S. 83 (1940). Indeed, "in taxation, even more than in other fields, legislatures possess the greatest freedom of classification." *Madden*, 309 U.S. at 88.

## II.

Remarkably, Appellants choose to ignore, indeed they reject, the test laid down in *Western & Southern* for determining when a state may impose more onerous taxes on foreign corporations than on domestic corporations. Rather, Appellants attempt to lump all such statutes and classifications together, allegedly based on 75 years of "precedent" which Appellants assert leads irresistably to the conclusion that "state taxes which discriminate against nonresident corporations [are] *per se* invalid". Appellants Br. at 12.

To the contrary, *Western & Southern* specifically provides that such classifications are not to be lumped together; that such classifications are not "*per se*" invalid;

and that each such classification is to be individually tested to determine if the challenged statute and the facts surrounding it bear a rational relation to a legitimate state purpose. When this test is applied to the seven opinions of this court upon which appellants rely for their *"per se"* doctrine, it becomes clear that the seven generally fit snugly within the confines of *Western & Southern*.

## III.

Appellants also rely heavily on ten state court decisions which they contend support their *"per se"* position. Appellants' Br. at 20-24. A review of these decisions, however, reveals no proper espousal of a *per se* doctrine. Indeed, two of the decisions were based on state law rather than equal protection grounds. *Columbia Gas Transmission Corporation vs. Commonwealth*, 468 Pa. 145, 360 A.2d 592 (1976); *Bullock vs. Farmland Industries, Inc.*, 603 S.W.2d 305 (Tex. Civ. App. 1980). In five of the remaining eight, the proponents of the statutes failed to proffer any legitimate state purposes the challenged classifications forwarded; or, if such purposes were tendered, the courts found them not to be rationally related to the subject legislation.[4] Two of the ten were decided pursuant to a standard specifically rejected by this Court in *Western & Southern*. *Department of Revenue vs. Amrep Corporation*, 358 So.2d 1343 (Fla. 1978); *Mary C. Wheeler School, Inc. vs. Board of Assessors*, 368 Mass. 344, 331 N.E.2d 888 (1975). The final case relied upon by Appellants not only espoused

[4]*Cleveland-Cliffs Iron Company vs. Department of Revenue*, 329 Mich. 225, 45 N.W.2d 46 (1950); *American Youth Foundation vs. Township of Benona*, 37 Mich. App. 722, 195 N.W.2d 304 (1972); *Missouri Pacific Railroad vs. Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983); *Metropolitan Life Insurance Company vs. Commissioners*, Nos. 31865, 31866 (D. Ct. N.D. May 23, 1983), *appeal docketed*, Nos. 10510, 10517 (N.D.); *Gilbert Associates, Inc. vs. Commonwealth*, 498 Pa. 514, 447 A.2d 944 (1982).



the *Western & Southern* rational basis test, the state court upheld the challenged classification. *In re Bacchus Imports, Ltd.*, 65 Hawaii 566, 656 P.2d 724 (1982), *rev'd and remanded on other grounds*, 52 U.S.L.W. 4979 (U.S. June 29, 1984).

## IV.

To determine whether the instant classification is rationally related to the achievement of a legitimate state purpose two questions must be answered: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & Southern*, 451 U.S. at 668. These two issues must not be confused. They must be addressed separately.

A. It is well settled that when a statute, as here, does not express the purposes or reasons for its enactment, the classification will not be held to be in violation of the Equal Protection Clause if any state of facts can be conceived that would sustain it. *Allied Stores of Ohio, Inc. vs. Bowers*, 358 U.S. 522 (1959). The trial court held that *at least* two legitimate state purposes are apparent from a reading of the Alabama statute — *i.e.*, encouraging the formation of new insurance companies in Alabama, and encouraging capital investment by foreign insurance companies in Alabama assets and government securities. J.S. App. at 20a-21a.

In addition to these purposes, there exist numerous other legitimate state purposes for which the subject statute may have been enacted. These purposes may be generally categorized under the broad headings of (1) the encouragement and promotion of the domestic insurance industry and (2) the promotion of increased insurance coverage in all

areas of Alabama and among all of its citizens. Such purposes are patently legitimate for a state to pursue and have been endorsed by this Court.

B. The second portion of the two-pronged test announced in *Western & Southern* is whether the state legislature reasonably could have believed the challenged statute would promote *any* of the conceivable state purposes noted above. This Court held: "the Equal Protection Clause is satisfied if we conclude that the California legislature *rationally could have believed* that the retaliatory tax would promote its objective." 451 U.S. at 672 (emphasis in original). Indeed, a statute is not to be overturned unless the classification "is so unrelated to the achievement of any combination of legitimate purposes that [this Court] can only conclude that the legislature's actions were *irrational*." *Vance* vs. *Bradley*, 440 U.S. 93, 97 (1979) (emphasis added).

Appellants cannot carry this burden. They have not removed the issue of reasonable belief from the field of debate nor have they proven the Legislature would have been irrational to believe the legitimate state purposes discussed above could be forwarded by the subject legislation.

Indeed, the applicable facts discussed in detail, *infra*, demonstrate not only that the Legislature could have believed the Alabama premium tax statute *could* forward the stated purposes but also that the statute in fact *has* forwarded those purposes. Therefore, it is respectfully submitted that the Alabama premium tax statute is due to be upheld and the decisions of the courts below affirmed.



## ARGUMENT

### I. The Equal Protection Clause Permits Differentiation Between Foreign and Domestic Corporations If It Is Rationally Related To Legitimate State Purposes

This Court in *Western & Southern Life Insurance Company* vs. *State Board of Equalization*, 451 U.S. 648 (1981), specifically held that states may differentiate between foreign and domestic corporations by imposing "more onerous taxes" on foreign corporations if "the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose". 451 U.S. at 668. Such is the case here.

In determining that California did not violate the Constitution by imposing a retaliatory tax against foreign insurers doing business in California, this Court noted:

> Ordinarily, there are three provisions of the Constitution under which a taxpayer may challenge an allegedly discriminatory state tax: the Commerce Clause. . .; the Privileges and Immunities Clause of Article IV, §2. . .; and the Equal Protection Clause. . . . This case assumes an unusual posture, however, because the Commerce Clause is inapplicable to the business of insurance . . . and the Privileges and Immunities Clause is inapplicable to corporations. . . . *Only the Equal Protection Clause remains as a possible ground for the invalidation of the California tax.*

*Id.* at 655-56 (citations omitted) (emphasis added).

Prior to so holding, this Court discussed its rationale for removing the Commerce Clause from its consideration in *Western & Southern*. The Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce. However, this Court noted:

> Congress may 'confe[r] upon the States an ability to

> restrict the flow of interstate commerce that they would not otherwise enjoy.' (citations omitted). If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge. *Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance* when it passed the McCarran-Ferguson Act, 59 Stat 33, 15 USC §1011, *et seq*.

*Id*. at 652-53 (emphasis added).

Nevertheless, appellants in *Western & Southern* argued that the McCarran-Ferguson Act does not permit "anti-competitive state taxation that discriminates against out-of-state insurers". *Id*. In response, this Court replied:

> We find no such limitation in the language or history of the Act.
>
> • • • •
>
> The Court has squarely rejected the argument that discriminatory state insurance taxes may be challenged under the Commerce Clause despite the McCarran-Ferguson Act.

*Id*. at 653-54.

This Court, therefore, emphatically held that the impact on interstate commerce of a tax which differentiates between foreign and domestic insurers is *not* germane to the question of the constitutionality of taxing statutes such as the one at issue and, therefore, should not be considered on this appeal.

Following the treatment of Commerce Clause considerations, the *Western & Southern* opinion recognized prior inconsistent decisions of this Court regarding the bases for constitutionally evaluating legislation which differentiates



between domestic and foreign corporations. In an effort to relieve the existing "tension" between the previous decisions, this Court enunciated the standard *now* to be used in determining whether taxes which differentiate between domestic and foreign corporations violate the Equal Protection Clause.

> We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, *unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose*.

*Id*. at 667-68 (emphasis added).

This Court then quoted with approval from *Power Manufacturing Company vs. Saunders*, 274 U.S. 490, 493-94 (1927) as follows:

> No doubt there are . . . subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.

451 U.S. at 668.

Fortunately, this Court then enunciated the test utilized to determine whether a challenged classification rests on "differences pertinent to the subject in respect of which the classification is made. . . ," stating:

> In determining whether a challenged classification is rationally related to achievement of a legitimate state

> purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose?, and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

*Id.*

The holding of *Western & Southern* is predicated upon a long history of this Court's decisions which further explains the standard to be applied in considering an equal protection challenge to a statute such as the instant one. For instance, equal protection does not require an iron rule of equal taxation. In this area, broad discretion is reposed in the legislative body. *Lehnhausen vs. Lake Shore Auto Parts Company*, 410 U.S. 356 (1973); *Madden vs. Kentucky*, 309 U.S. 83 (1940).

In describing the basic prohibition of the Fourteenth Amendment, this Court in *Western & Southern* stated:

> The Fourteenth Amendment forbids the States to 'deny to any person within [their] jurisdiction equal protection of the laws' but does not prevent the States from making reasonable classifications among such persons.

451 U.S. at 656-57 (citations omitted). This Court cited *Lehnhausen*, 410 U.S. at 359-60, and *Allied Stores of Ohio, Inc. vs. Bowers*, 358 U.S. at 526-27 in support of this proposition. These two cases also dealt with the standards by which tax classifications are scrutinized under the Equal Protection Clause.

In the *Lehnhausen* case, an Ohio corporation challenged a provision of the Ohio constitution which prohibited the State from enacting personal property taxes against individuals, but which allowed such taxes to be assessed against, *inter alia*, corporations. In sustaining the difference in



treatment, the Court in *Lehnhausen* cited *Madden vs. Kentucky*, 309 U.S. 83 (1940). In *Madden*, Plaintiffs made an equal protection challenge to a Kentucky statute which imposed a larger annual *ad valorem* tax on deposits by residents in banks outside the State than was imposed on residents' bank deposits within the State. In sustaining the tax provision, this Court wrote:

> It has, because of this, been pointed out that *in taxation*, even more than in other fields, *legislatures possess the greatest freedom of classification*. Since the members of a legislature necessarily enjoy a familiarity with local conditions *which this Court cannot have*, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *The burden is on the one attacking* the legislative arrangement *to negative every conceivable basis* which might support it.

*Madden*, 309 U.S. at 88 (emphasis added).

The *Allied Stores* case involved an Ohio statute which required residents to pay *ad valorem* taxes on merchandise held in Ohio storage warehouses for storage only, while non-residents of the State were exempted from the provision. This Court upheld that classification, providing: "[I]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it". *Allied Stores*, 358 U.S. at 528. Indeed, if the rationality of the means to the legitimate end *is even debatable*, the legislature's judgment is to be affirmed and the challenger's attack must fail. *Western & Southern*, 451 U.S. at 674; *Minnesota vs. Clover Leaf Creamery Company*, 449 U.S. 456, 464, *reh'g denied*, 450 U.S. 1027 (1981).

In summary, an equal protection challenge to a statute must fail if there is a *conceivable* legitimate purpose for which the statute may have been enacted, and if the lawmakers *could have* reasonably believed that the use of the challenged classification would promote that purpose. This Court wisely noted:

> [T]he courts are not empowered to second-guess the wisdom of state policies. (citations omitted). Our review is confined to the *legitimacy* of the purpose.

*Western & Southern*, 451 U.S. at 670 (emphasis in original). The burden is upon those challenging the classification to negative every conceivable basis which might support it and to demonstrate that it would have been irrational for the legislature to have believed that the subject statute could have accomplished any conceivable legitimate state purpose.

## II. Previous Decisions Of This Court Concur

Appellants' primary thrust is that somehow it is unfair to have a taxing differential between foreign and domestic corporations regardless of the facts presented in each unique situation. Appellants insist that foreign and domestic corporations must be treated equally to pass the muster of the Equal Protection Clause. Indeed, neither foreign corporations or domestic corporations may be treated differently "*unless* the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose". *Western & Southern*, 451 U.S. at 668 (emphasis added).

Remarkably, Appellants choose to ignore, indeed they reject, the test laid down in *Western & Southern* for determining when a state may impose more onerous taxes on foreign corporations than on domestic corporations — *i.e.*,



does the classification bear a rational relation to a legitimate state purpose. Rather, Appellants attempt to lump all such classifications together, allegedly based on seventy-five years of "precedent" which Appellants assert leads irresistably to the conclusion that "state taxes which discriminate against nonresident corporations [are] *per se* invalid." Appellants Br. at 12.

Contrary to Appellants' pleas, there is no doubt a state may place more "onerous taxes" on foreign insurers if "the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose". *Western & Southern*, 451 U.S. at 668. *Western & Southern* specifically provides such classifications are not to be lumped together; are not "*per se* invalid"; and each such classification is to be individually tested to determine if the challenged statute and the facts surrounding the same bear a rational relation to a legitimate state purpose. If the statute does, it is constitutional. If it does not, it is unconstitutional.

When this test is applied to the seven opinions of this Court upon which Appellants rely for their "*per se*" doctrine, it becomes clear that the seven generally fit snugly within the confines of *Western & Southern*.[8] In all seven cases the proponents of the challenged legislation either failed to indicate any allegedly legitimate state purposes which the statute could forward or, if they did, failed to demonstrate a rational relation between the statute and the legitimate purposes. Indeed, common sense requires the conclusion that if the proponents of a challenged classification fail to proffer legitimate state purposes which the statute serves, it is most unlikely such purposes exist or are

[8] *To the extent, if any, that the cases preceding Western & Southern place a greater burden on the States, they were overruled by implication in Western & Southern.*

served. Hence, the state tax statutes discussed below were not struck down because they discriminated against non-resident corporations. Rather, they were invalidated because it was not shown that the discrimination bore a rational relation to a legitimate state purpose.

For instance, in *Concordia Fire Insurance Company vs. People*, 292 U.S. 535 (1934), an Illinois statute, which required foreign corporations to pay tax on in-state property assessed at full market value but only taxed the property of domestic corporations at 60% of full market value, was challenged on equal protection grounds. Holding the discrimination to be unconstitutional, this Court noted: "No reasonable basis for such a discrimination is suggested and none is perceived." *Id.* at 545.

In *Southern Railway Company vs. Greene*, 216 U.S. 400 (1910), Southern Railway Company challenged on equal protection grounds an Alabama act which required every foreign corporation authorized to do business in the State to pay an annual franchise tax based on the amount of capital stock used by it in the State. Domestic corporations were not subject to the tax. No legitimate state purposes were forwarded which would justify the discrimination. Instead, the State placed "much weight upon the cases in this Court which have sustained the right of the State to exclude a foreign corporation from its borders, and to impose conditions upon the entry of such corporations into the State for the purpose of carrying on business therein". *Id.* at 413.

This Court held that the authority proffered by the State was not applicable because Southern Railroad was admitted to do business in Alabama prior to the passage of the legislation. Hence, as the State of Alabama failed to offer any legitimate state purposes which could be forwarded by the



challenged classification, this Court had no choice, *based on the facts presented*, but to find a denial of equal protection.[8]

In *Bethlehem Motors Corporation vs. Flynt*, 256 U.S. 421 (1921), the third opinion of Appellants' "magnificent seven", this Court entertained an equal protection challenge to a North Carolina statute which imposed a $500.00 license tax on all manufacturers of automobiles engaged in selling automobiles in the State. The tax applied to both foreign and domestic corporations. If a manufacturer, however, invested three-fourths of its assets in North Carolina investments or property, the tax was reduced to $100.00. The challengers contended all foreign corporations were charged $500.00 and all domestic corporations were charged $100.00 because the foreign corporations could never qualify for the $100.00 tax.

Not only did North Carolina fail to forward any legitimate state purposes the challenged legislation served, its Attorney General, to the contrary, commented that passage of the act was an "utterly futile project". *Id.* at 425. This Court once again had no choice but to hold the subject statute to be in violation of the Equal Protection Clause.

The fourth case relied on by Appellants is *Hanover Fire Insurance Co. vs. Carr*, 272 U.S. 494 (1926). This Court again considered an equal protection challenge to the Illinois taxing scheme discussed above in *Concordia*. In response, the State set forth no legitimate state purposes, relying only on the assertion that the tax was part of the

[8]Additionally, although the Court in *Southern Railway* speaks in terms of equal protection, there is a strong inference that a Commerce Clause test – *i.e.*, whether interstate commerce was being burdened, was actually applied in determining the constitutionality of the statute. For example, as this Court noted in *Western & Southern*, the *Southern Railway* Court relied on two Commerce Clause cases in reaching its decision. 451 U.S. at 662, n.14.

conditions foreign insurers were required to perform to do business in Illinois. With no equal protection argument forwarded in favor of the statute, this Court struck it down.

In 1949, this Court invalidated an Ohio law which imposed an *ad valorem* tax on certain accounts receivable of nonresident corporations. No similar tax was applied to identical property of Ohio citizens and companies. *Wheeling Steel Corporation* vs. *Glander*, 337 U.S. 562 (1949). Ohio's only attempt to justify the discrimination was that treatment would be equal if other states would reciprocate with similar taxing plans. This Court found no indication that other states would reciprocate. Ohio failed to offer even one legitimate state purpose the statute might forward. Hence, faced with nothing more than a bald statute which discriminates between foreign and domestic corporations, the Court struck down the legislation.

Amazingly, Appellants also place great reliance on *Reserve Life Insurance Company* vs. *Bowers*, 380 U.S. 258 (1965). Appellants Br. at 8, 10, 14, 19, 20, 34. The memorandum opinion provides:

> March 15, 1965. Per Curiam: The judgment is reversed and the case is remanded to the Court of Appeals, First Appellate District, Ohio. *Wheeling Steel Corp.* vs. *Glander*, 337 U.S. 562, 93 L.Ed. 1544, 60 S. Ct. 1291.

380 U.S. 258.

Having nothing from the Court upon which to rely, Appellants seize upon the brief of the State of Ohio. Based thereon, Appellants lecture this Court on what it should have written in an otherwise opaque memorandum opinion. Not surprisingly, the opinion Appellants proffered as a substitute fits nicely into the alleged "pattern" of the other cases upon which they rely. Perhaps these machinations best demonstrate the paucity of authority available to



Appellants. The only thing which can be determined with certainty from *Reserve Life* is that the case was reversed and remanded.[7]

The final selection of Appellants is *WHYY* vs. *Glassboro*, 393 U.S. 117 (1968). There, a nonprofit television station incorporated outside of New Jersey was denied exclusion from New Jersey property taxes because it was a foreign corporation. Similar domestic nonprofit corporations qualified for the exclusion. The State contended the exclusion was denied because of the increased cost and difficulty of administration when foreign corporations were involved. No other justification was tendered.[8] This Court found no facts to back up the contentions of New Jersey and invalidated the statute.

### III. State Court Cases Relied Upon By Appellants Are Of No Aid

Appellants also give great weight to ten state court cases which they assert support their *"per se"* position. Appel-

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[7] A review of the decision of the lower court reveals the Supreme Court of Ohio dismissed the appeal "for the reason that no substantial constitutional question is involved". *Reserve Life Insurance Company* vs. *Bowers*, 175 Ohio St. 468, 196 N.E.2d 87 (1964). This conclusion apparently was based on the holding that the "distinction between domestic and foreign insurance companies was neither an unreasonable classification nor discriminatory". *Id.* (emphasis added). One must assume this Court addressed the unique facts surrounding the *Reserve Life* statute and determined that the statute did discriminate between foreign and domestic insurers. This, of course, gives rise to a substantial federal question which should be addressed by the Ohio courts – *i.e.*, whether the discrimination bears a rational relation to a legitimate state purpose.

[8] This Court noted: "This is not a case in which the exemption was withheld by reason of the foreign corporation's failure to benefit the State in the same measure as do domestic corporations. Nor have the Appellees advanced any other distinction between this Appellant and domestic nonprofit corporations which would justify the inequality of treatment." 393 U.S. at 120. Such is not the case here. The advantages derived by the State of Alabama from domestic insurers are discussed in detail, *infra*, at pages 55-60.

lants' Br. at 20-24. The following review of these opinions quickly dissolves the purported support. For example, in *Cleveland-Cliffs Iron Company* vs. *Department of Revenue*, 329 Mich. 225, 45 N.W.2d 46 (1950); *American Youth Foundation* vs. *Township of Benona*, 37 Mich. App. 722, 195 N.W.2d 304 (1972); *Gilbert Associates, Inc.* vs. *Commonwealth*, 498 Pa. 514, 447 A.2d 944 (1982); *Columbia Gas Transmission Corporation* vs. *Commonwealth*, 468 Pa. 145, 360 A.2d 592 (1976); and *Bullock* vs. *Farmland Industries, Inc.*, 603 S.W.2d 305 (Tex. Civ. App. 1980), no legitimate state purposes which the discrimination between domestic and foreign corporations might forward were brought forth. In the absence of such purposes and facts indicating the classifications would forward the same, the various courts were correct in disposing of the challenged statutes.

Strangely enough, even though Appellants fail to mention it, *Columbia Gas* and *Bullock* were not decided on equal protection grounds. The *Bullock* statute succumbed to state law. 603 S.W.2d at 307. In *Columbia Gas*, the court held that the challenged tax was invalid because it violated the uniformity clause of the Pennsylvania Constitution. 360 A.2d at 594.

In *Mary C. Wheeler School, Inc.* vs. *Board of Assessors*, 368 Mass. 344, 331 N.E.2d 888 (1975), a statute which denied tax exemptions to non-resident charitable institutions but which granted the exemption to similar domestic entities was struck down on equal protection grounds. Massachusetts contended the discrimination was permissible because it "would not have control over the regulation of these foreign corporations in the sensitive area of charitable exemptions" and "Massachusetts could not revoke the charter of the foreign corporation if it violated its public trust". 331 N.E.2d at 892. The Massachusetts Supreme



Court rejected this explanation as specious, noting that the ability of the State to fine and enjoin the operation of foreign charities subjects them to supervision and control substantially similar to that imposed on domestic institutions. *Id.* at 893.

This evaluation of the purposes, however, was dicta as the Massachusetts court erroneously held that states cannot, for taxing purposes, favor state residents over nonresidents. *Id.* at 890. This conclusion apparently was predicated upon the concurring opinion in *Allied Stores of Ohio, Inc.* vs. *Bowers*, 358 U.S. 522 (1959). The Massachusetts court agreed with the concurring opinion's assertion that the Equal Protection Clause denies a state "the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation".[9] 331 N.E.2d 890-91.

This contention is easily disposed of as this Court in *Western & Southern* rejected that proposition stating:

> Their [the Justices in *Allied Stores* concurring opinion] position has not been adopted by the Court, which has subsequently required no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation. (Citations omitted).

451 U.S. at 667, n.21. Hence, the reasoning in *Mary C. Wheeler School* should not be considered because of its conflict with the opinion of this Court.

In *Department of Revenue* vs. *Amrep Corporation*, 358 So.2d 1343 (Fla. 1978), Florida cited two rational bases for upholding the challenged classification. Unfortunately, the Florida Supreme Court did not consider the legitimacy of the asserted purposes. Rather, it also adopted the "federal-

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[9] 358 U.S. at 535.

ism" test espoused in the concurring opinion of *Allied Stores*.[10] *Id.* at 1352. Hence, the classification was struck down solely because it discriminated against foreign corporations. As this case is also repugnant to the requirements of *Western & Southern*, it should be disregarded.

Appellants also rely on *Missouri Pacific Railroad vs. Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983), which involved an equal protection attack on a Missouri statute which required foreign corporations to pay an additional domestication tax on the proportion of stated capital and surplus represented by an increase in property and business in Missouri. Domestic corporations were not subject to the tax. *Id.* at 130. Missouri contended the statute served two legitimate state purposes. First, the statute allegedly was passed to avoid the Commerce Clause problem involved in the imposition of a privilege tax upon authorized and in part unissued stock. *Id.* at 133. Second, the State asserted the statute prevented discrimination against domestic corporations.[11]

Rather than ruling the subject discrimination was *per se* violative of the Equal Protection Clause, the rational basis test required by *Western & Southern* was applied. *Id.* at

[10]The Florida Supreme Court perceived the "federalism" test to be: "Where a nonresident makes a challenge to a state's tax scheme it must first be determined whether the classification discriminates against the nonresident in such fashion as to unduly impinge upon our system of federalism which the Equal Protection Clause is intended to foster and protect along with the Commerce Clause and the Privileges and Immunities Clause. If no such impediment is found, the traditional test of a rational basis for the classification must then be applied. If the tax scheme fails to pass muster under either test, the statute must fall. 358 So.2d at 1088.

[11]This contention was based on the convoluted reasoning that without the tax a corporation could be licensed out of state, qualify to do business in Missouri and use an extensive amount of its capital in intrastate business without additional expense, whereas a competing domestic corporation would be required to pay a large fee on any sizeable increase of its capitalization. 652 S.W.2d at 133.



133. Based upon the statute in question and the facts presented to it regarding the legislation, the Missouri court held that the classification served no legitimate purpose and, therefore, invalidated the statute. *Id.* at 133.

In like manner, the Supreme Court of Hawaii applied the *Western & Southern* standard in *In re Bacchus Imports, Ltd.*, 65 Hawaii 566, 656 P.2d 724 (1982), *rev'd and remanded on other grounds*, 52 U.S.L.W. 4979 (U.S. June 29, 1984). Based thereupon, it held the challenged Hawaii taxing statute was not violative of the Equal Protection Clause.[12]

Finally, Appellants rely on *Metropolitan Life Insurance Company vs. Commissioner*, Nos. 31865, 31866 (May 23, 1983), *appeal docketed*, Nos. 10510, 10517 (N.D.). This decision of the District Court for the South Central Judicial District of North Dakota, is presently on appeal. (reprinted at J.S. App. at 38a-51a). The challenged statute, which imposed a larger premium tax on foreign insurance companies than on domestic insurance companies, was held unconstitutional on equal protection grounds by the trial court. The court appears to have applied a rational basis test.

Based on the facts and circumstances unique to North Dakota, the trial court, commenting that at the time the taxing statute was adopted there were no domestic insurance companies in North Dakota, ruled the sole purpose in adopting the tax was to raise revenue. The trial court rejected the purposes forwarded by the State in support of the statute, holding that the legislature did not advance these purposes as a basis for adopting the tax or that the

[12]This Court reversed the Hawaii Supreme Court on the ground that the discrimination between foreign and domestic corporations violated the Commerce Clause. As discussed previously, the McCarran-Ferguson Act precludes Commerce Clause considerations in the instant appeal.

proffered purposes either were not legitimate or were not rationally related to the achievement of a legitimate state purpose. *Id.* Not being privy to the facts surrounding the North Dakota situation, Appellee/Intervenors cannot comment on the propriety of the court's decision.

However, it is apparent from a review of the decisions of this Court and the state decisions relied on by Appellants that state taxes which discriminate against foreign corporations are not invalid *per se*. Rather, it is clear that states may enact taxes which discriminate against foreign corporations so long as a rational basis for the different treatment exists. Each statute and the facts surrounding it must be examined on an individual basis to determine whether that particular classification is rationally related to the achievement of a legitimate state purpose.

## IV. Rational Basis Test Upholds The Statute

How does one determine whether the instant classification is rationally related to the achievement of a legitimate state purpose? By answering two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & Southern*, 451 U.S. at 668. These two issues must not be confused. They must be addressed separately.

### A. *Statute Has Legitimate State Purposes.*

First, the issue of whether the challenged legislation has a legitimate state purpose will be treated. It is well settled that when a statute does not express the purposes or reasons for its enactment, a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause



if any state of facts reasonably can be *conceived* that would sustain it". (Citations omitted) *Allied Stores of Ohio, Inc. vs. Bowers*, 358 U.S. 522, 528 (1959) (emphasis added). The Alabama Code (1975) is silent as to the purposes for which the challenged statute was enacted.[10] Therefore, an inquiry into the purposes which the Alabama Legislature may have had in enacting the premium tax statute must include a consideration of all purposes which *could* have been conceived by the Legislature. The Appellants have the extraordinarily heavy burden of negating every conceivable basis which *might* support the statute. *Madden*, 309 U.S. at 88.

Initially, it is necessary to dispose of one of Appellants' primary attacks – *i.e.*, the subject taxing statute has raising revenue as one of its purposes and is, therefore, in some manner constitutionally tainted. Appellants Br. at 25-26. There can be no doubt that any tax raises revenue. Moreover, a legislature which enacts any taxing measure must be cognizant that the tax will serve the purpose of raising revenue. However, there is also no doubt that states may place more onerous tax burdens on foreign corporations, even if the tax does raise revenue, if there are legitimate state purposes to which the challenged classification is rationally related. Such is the case here.

The trial court held at least two legitimate state purposes are apparent from reading the statute, stating:

> A review of the statute on its face, reveals *at least* two purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute. Under the *Western & Southern* analysis, this Court

[10]Appellants concur on page 32 of their brief at n.26.

finds these purposes to be legitimate. The evidence submitted also establishes the existence of *at least* these purposes.

J.S. App. 20a-21a (emphasis added). The Alabama Court of Civil Appeals concurred and the Alabama Supreme Court affirmed the trial court's conclusion. J.S. App. 2a-12a. The legitimacy of both of these purposes has been consistently endorsed by this Court.

In addition to the legitimate purposes noted by the Alabama courts, there exist numerous other conceivable legitimate state purposes for which the subject statute may have been enacted. Appellee/Intervenors furnished the trial court with the following list of additional legitimate purposes which the Alabama Legislature conceivably could have had in mind at the time it passed the subject statute.

a. To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on an equal footing with well-established, out-of-state companies.

b. To promote the growth and development of a domestic insurance industry.

c. To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies, thereby making the insurance market more competitive.

d. To reduce the barriers to entry into the insurance industry.

e. To encourage domestic insurance companies to keep their home offices in Alabama.

f. To extend the range of customer choice among alternative insurance companies.



g. To encourage more insurance to be sold in Alabama.

h. To promote a greater level of average insurance coverage per family in Alabama.

i. To enhance the use of insurance for Alabama families.

j. To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, financial losses, and other such calamities as may render debilitating financial losses. Such protection lessens the burden that calamities might otherwise impose on state and local governments and thus on Alabama taxpayers.

k. To promote the greater use of insurance of all types in rural and sparsely populated sections of Alabama, market segments which usually are ignored by large, foreign companies.

l. To lessen the adverse impact which foreign insurance companies have on the economy of Alabama by channeling the premiums collected in Alabama to investments and purposes outside the State.

Appendix to Appellee/Intervenor's Motion to Dismiss or Affirm, 9a-19a. No one can seriously contend that states may not legitimately pursue these purposes.

For purposes of this discussion, legitimate state purposes a. through e. will be considered under the broad heading of promoting the growth and development of the domestic insurance industry. Legitimate state purposes f. through l. will be discussed as those purposes which promote increased insurance coverage in all areas of Alabama and among all of its citizens.

1. *Promotes Growth and Development of the Domestic Insurance Industry*

It is respectfully submitted that the Alabama premium tax statute promotes and encourages the development of the State's insurance industry by (1) encouraging the formation of new insurance companies in Alabama; (2) reducing the barriers to entry into the insurance industry; (3) making it economically feasible for young relatively small domestic companies to compete on a more equal footing with well-established out-of-state companies; and (4) encouraging domestic insurance companies to keep their home offices in Alabama.

This Court has consistently held that encouraging a domestic industry is a legitimate purpose for a state to pursue. For instance, in *Allied Stores* this Court upheld the constitutionality of an Ohio statute which exempted from taxation merchandise and agricultural products belonging to a nonresident if held in an Ohio warehouse for storage only, stating:

> [I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment.
>
> . . .
>
> [I]t is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy. . . . Other similar purposes reasonably may be conceived. Therefore, we cannot say the discrimination was . . . not founded upon a reasonable distinction or difference in state policy or that no state of facts can be conceived to sustain it.



358 U.S. at 528-29. It cannot be said that encouraging the location of or formation of insurance companies in Alabama is any less legitimate than encouraging the location of warehouses in Ohio.

In like manner, this Court in *Parker vs. Brown*, 317 U.S. 341 (1943), in rejecting a Commerce Clause challenge to a California statute which regulated the marketing of California's raisin crop, provided that enhancing the ability of a local industry to operate profitably is a legitimate state interest,[58] stating:

> [The] production and marketing of raisins presents a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries.

317 U.S. at 363.

Indeed, this Court in *Western & Southern* concurred, noting:

> There can be no doubt that promotion of domestic industry by deterring barriers to interstate business is a legitimate state purpose. This Court has recognized the legitimacy of state efforts to maintain the profit level of a domestic industry, *Parker vs. Brown*, 317 U.S. 341, 363-367, 87 L.Ed. 315, 63 S. Ct. 307 (1943), and of efforts to 'protect and enhance the reputation'

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[58] For other decisions of this Court recognizing the legitimacy of a state's interest in promoting local industry *see, e.g., Pike vs. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Carmichael vs. Southern Coal & Coke Company*, 301 U.S. 495 (1937).

State courts have also concluded that a state may legitimately promote its local industry by favoring domestic corporations over foreign corporations. *See, e.g., State vs. Swastobia Blank Book & Stationery Co.*, 115 Minn. 254, 76 So. 258 (1917); *Equitable Shipyards vs. State*, 93 Wash.2d 465, 611 P.2d 396 (1980).

> of a domestic industry so that it might compete more effectively in the interstate market, *Pike* vs. *Bruce Church, Inc.*, 397 U.S. 137, 143, 25 L.Ed.2d 174, 90 S. Ct. 844 (1970).

451 U.S. at 671.[18] Most recently, in *Bacchus Imports, Ltd.* vs. *Dias*, 52 U.S.L.W. 4979 (U.S. June 29, 1984), this Court held: "No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."[19] 52 U.S.L.W. at 4981. There is, therefore, no doubt that promoting domestic industry and ensuring the profitability of domestic industry are legitimate state purposes recognized by this Court.

2. *Encourages Investment in Alabama*

The trial court's conclusion that another legitimate purpose for the subject statute was to encourage capital investment by foreign insurers in Alabama investments also was proper. Section 27-4-4 (c) defines "Alabama investments". Appendix to Appellants Br. at 6a to 9a. As discussed *supra*, this Court consistently has held that it is a legitimate purpose for a state to promote the formation of and location of facilities or companies within its borders by discriminating between foreign and domestic corporations. Moreover, in *Western & Southern* it was noted: "This Court has recognized the legitimacy of state efforts to maintain the profit level of a domestic industry. . . ." 451 U.S. at 671. Seeking the location of and formation of industries within a state

[18]Appellants throughout the proceedings below contended that promotion of a domestic industry is not a legitimate state purpose unless the promotion deters barriers to interstate commerce. Appellants seek to prove too much as the opinions cited *supra* establish. Moreover, pursuant to the McCarran-Ferguson Act, the effect on interstate commerce of state regulation of the insurance industry is not to be considered.

[19]This Court reversed the decision of the Hawaii Supreme Court based on Commerce Clause considerations.



> and maintaining the profit margin of domestic industries are purposes which legitimately may be pursued by differentiating between foreign and domestic corporations. This directly results in investment in local assets. It must be concluded, therefore, that attempts to attract investments in Alabama assets are constitutionally permissible — *i.e.*, legitimate state purposes.

3. *Promotes Insurance Coverage*

The Alabama premium tax statute promotes increased insurance coverage in all areas of Alabama and among all of Alabama's citizens by (1) creating a more vigorously competitive market for insurance within Alabama; (2) promoting the development of domestic insurance companies capable of competing on a more equal footing with well-established, out-of-state companies; (3) extending the range of customer choice among alternative insurance companies; (4) encouraging the sale of more insurance in Alabama; (5) promoting the greater use of insurance of all types in rural and sparsely populated sections of Alabama; (6) promoting a greater level of insurance coverage per family in Alabama; and (7) enhancing the use of insurance by Alabama families.

No one can seriously contend that states may not legitimately pursue any of the purposes set forth above. Now that the first part of the rational basis test has been satisfied, the statute must be tested in the crucible of "reasonable belief".

### B. *Belief That Statute Promotes Purposes Is Reasonable*

The second part of the two-pronged test announced in *Western & Southern* is whether the state legislature reasonably could have believed that the challenged statute would

promote any of the conceivable legitimate state purposes. This Court further explained this standard, stating: "[W]hether in fact the [statute] will accomplish its objective is not the question: the Equal Protection Clause is satisfied if we conclude that the California legislature *rationally could have believed* that the retaliatory tax would promote its objective". 451 U.S. at 671-72 (emphasis in original).

The issue of whether the Alabama Legislature reasonably could have believed the premium tax differential would promote any of its conceivable legitimate purposes is to be resolved in favor of the constitutionality of the legislation if the issue "is at least debatable". *Western & Southern*, 451 U.S. at 674. Moreover, "those challenging the legislative judgment must convince the Court that the legislative facts upon which the classification is *apparently* based *could not reasonably* be conceived to be true by the governmental decisionmaker". *Minnesota vs. Clover Leaf Creamery Company*, 449 U.S. 456 at 464, *reh'g denied*, 450 U.S. 1027 (1981) (emphasis added).

Perhaps this Court in *Vance vs. Bradley*, 440 U.S. 93 (1979), best expressed the heavy burden on one challenging a statute such as the instant one on equal protection grounds. Therein this Court ruled:

> Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions *were irrational*.

440 U.S. at 97 (emphasis added).

Appellants cannot carry this burden. They have not removed the issue of reasonable belief from the field of debate nor have they proven the Legislature would be irrational to believe the legitimate purposes noted *supra* could be forwarded by the subject legislation. Dr. Arthur A. Thompson, Jr., an eminent scholar and economist, remarking on the legitimate state purposes tendered in support of the challenged statute stated: "Significantly, each and every one of these purposes and benefits is rooted in standard economic theory and business analysis. Hence, state legislators, either personally knowledgeable in business and economic matters or exposed to the arguments of those with such knowledge, could rationally be attracted to enact differential premium tax legislation so as to secure the expected benefits for the state's economy and citizenry." Joint Appendix (hereinafter "J.A.") at 70-71. Set forth below is a detailed discussion of the facts which demonstrate not only that the Legislature could have rationally believed the statute *would* forward the tendered legitimate purposes, but also that the legislation in fact *has* forwarded those purposes.



1. *Encourages Investment in Alabama*

Even a cursory reading of the statute at issue confirms the decisions of the courts below that the Alabama Legislature reasonably could have believed that the statute *at least* would promote the legitimate purpose of encouraging investment by foreign insurers in Alabama assets. For instance, paragraph (b) of §27-4-4, the section setting forth the premium tax on foreign insurers, provides that a foreign insurer may reduce the rate at which its premiums are taxed according to the percentage of the insurer's assets which are invested in Alabama investments.

Certainly, a statute which gives a taxpayer the incentive to *reduce* the revenues it pays by investing in Alabama investments must have at least one legitimate purpose. Could it be "encouraging capital investment by foreign insurance

3. *Promotes Growth and Development of the Domestic Insurance Industry*

The facts before this Court demonstrate that the Legislature rationally could have believed the legitimate state purposes of promoting the growth and development of the domestic insurance industry would be served by the Alabama premium tax statute.

a. *Statute allows competition on a more equal footing.* It is not disputed that there are two serious barriers to entry into the insurance industry. They are economies of scale and capital requirements. Overstreet Affidavit, J.A. at 156. Dr. George A. Overstreet, Jr., an economist and specialist in the insurance industry, states that the instant premium tax differential aids the small and young domestic firms in overcoming these barriers to entry. J.A. at 158. This in turn helps young, relatively small domestic firms compete on a more nearly equal footing with large, well-established, out-of-state companies. As Dr. Thompson notes, the two or three percent tax savings can be the difference between a domestic firm's survival or failure until it has time to grow to a size allowing it to reap the benefits of economies of scale. J.A. at 86.

To establish that economies of scale are significantly different for foreign companies as compared to domestic companies in Alabama, one need only compare the assets of the two groups. For instance, in 1979 the five largest foreign life insurers had combined assets of $167,568,848,000.00. The five largest domestic life insurers' combined assets totalled $2,277,899,000.00 or only 1.36 percent of the foreign insurers' assets. Thompson Affidavit, J.A. at 87.

Astoundingly, Appellants' expert concurred, stating: "Dr. Thompson and I agree, in that discriminatory taxation does



companies in . . . Alabama assets . . ." as held by the trial court? J.S. App. at 21a. Logic demands such a conclusion. Logic is underscored by fact. In 1980, some 221 foreign insurers had enough admitted assets in Alabama to take advantage of Alabama's investment provisions. Thompson Affidavit, J.A. at 104.

Appellants' protestations that such investments never permit an equalization of the taxes on foreign and domestic insurers[17] beg the question before the Court. Equal protection permits a differential. Moreover, there are a combination of conceivable state purposes which jointly support the legitimacy of this statute. It is not necessary that each purpose completely support the statute so long as a combination thereof is sufficient. *Vance* vs. *Bradley*, 440 U.S. at 97. Such is the case here.

2. *Encourages the Formation of Domestic Insurance Companies*

An insurance company is defined as a "domestic insurer" and thereby pays the lower premium tax rate if it is "organized under the laws of the State of Alabama [and] maintains its principal office and chief place of business in the State of Alabama". §27-4-1 (5). Would this tend to encourage "the formation of new insurance companies in Alabama . . ." as the trial court held? Logic again requires such a conclusion. Indeed, Appellants' expert, Dr. Hollander, admitted that "discriminatory taxation does provide encouragement for the formation of new domestic insurance companies". J.A. at 299. As there is no debate that the challenged classification forwards this legitimate purpose, the rational basis has been established and the Alabama premium tax statute is due to be upheld.

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[17]Appellants Br. at 17-20.

permit smaller domestic firms to compete with larger foreign firms. . . ."[28] J.A. at 330-31. In even broader terms, Dr. Hofflander admitted that "growth of domestic companies may be promoted . . ." by the premium tax differential. *Id.* at 287.

Once again there is no debate that the challenged classification promotes the growth of the domestic industry, a purpose this Court has held to be legitimate. The Alabama premium tax statute is due to be upheld.

b. *Statute creates more competitive market.* According to Dr. Thompson, another purpose the Legislature could have had in enacting the subject legislation was to create a more lively and vigorously competitive market within Alabama by promoting the growth and development of domestic insurance companies capable of competing on a more equal footing with well-established, out-of-state companies. J.A. at 78. A review of Alabama Department of Insurance records reveals that the tax has had that effect. From 1955 to 1980, a period during which the subject statute or one of its predecessors has been in effect,[29] the annual life premiums written by domestic companies rose from $65.4 million to $502.1 million – an increase of approximately five-fold. During the same period the annual life premiums written by foreign life insurers rose even more rapidly from $104.5 million to $900.9 million – an increase of approximately nine-fold. J.A. at 80. "[F]oreign insurers have continued to thrive and domestic insurers have been able to carve out a respectable enough and large

[28]Hofflander's complaint is that aiding domestic firms is not a legitimate interest to pursue. J.A. at 331. To the contrary, this Court has long held that the promotion of a domestic industry is a legitimate state purpose.

[29]A differential premium tax was reinstituted in 1955 by the Alabama Legislature, Act of April 15, 1955, No. 77, 1955 Ala. Acts 105, following a ten year period of equal taxation. *See* Act of June 23, 1945, No. 156, 1945 Ala. Acts 198.



enough market share to serve as a valuable source of added competition." Thompson Affidavit, J.A. at 80.

Appellants' contention that the differential premium tax "deprives consumers in the state of the benefits of competition," Appellants Br. at 33, cannot withstand an objective review of the facts. For instance, the expert upon whom Appellants relied below stated: "In 1964, 22% of the U.S. legal reserve life insurance companies did business in Alabama. As a result of this development Alabama should be *a more competitive* marketplace for insurance products with resulting benefits to the citizens of Alabama". Hoffander Affidavit, J.A. at 230 (emphasis added). The good doctor also candidly admitted: "The rate of growth in property and liability premiums since 1969 has been extraordinary for domestic firms and foreign firms. Domestic firms recorded growth of almost 17% per year compounded." *Id.* at 234. Has the differential premium tax retarded competition? Obviously not. Has it promoted the growth of domestic insurers? Obviously it has. Again there appears to be no debate that the statute does promote the domestic insurance industry and is, therefore, due to be sustained.

Fortunately, the Alabama Legislature so finely tuned the differential in the premium tax rates between foreign and domestic insurers that not only is the domestic industry promoted, but the foreign insurers have also flourished. Far from languishing in alleged anti-competitive doldrums, the poor foreign insurers in 1980 only collected 86.8 percent of every premium dollar paid on fire and casualty policies in Alabama, J.A. at 79, and 74.9 percent of every premium dollar paid on life policies. J.A. at 80. Perhaps this is why in 1981, 1,104 foreign insurance companies[30]

[30]In 1981, only 86 domestic companies did business in Alabama. J. A. at 83.

found the Alabama premium tax climate sufficiently pleasant to cause them to do business in Alabama. J.A. at 85.

Fortunately, there is no dispute that the challenged legislation promotes and encourages the growth of the domestic insurance industry, a purpose this Court has held to be legitimate. Hence, the Alabama premium tax statute is due to be upheld.

4. *Promotes Insurance Coverage*

The facts before this Court also disclose that the Legislature rationally could have believed the legitimate state purpose of promoting insurance coverage of all Alabama citizens in every area of the State would be forwarded by the premium tax differential.

a. *Promotes insurance coverage in rural areas.* The more rural areas of Alabama are market segments which tend to be less attractive to large foreign corporations because of limited profitability. These neglected areas could be more attractive to domestic companies looking for niches in the market place if such concentration is made economically feasible. Thompson Affidavit, J.A. at 98-99. Dr. Thompson opined: "A lower premium tax rate for domestic companies is one means whereby a state with a significant rural populace can encourage the extension of an important item like insurance to all areas and communities . . .". *Id.* at 99. It appears the premium tax has had this expected result.

Moreover, the evidence demonstrates the urban emphasis of foreign insurers. In 1982, the ten largest foreign life insurers, based on premiums written, had 3,761 agents in Alabama. The ten largest domestic life insurers had 3,806. Despite the almost equal number of agents, the foreign companies had 2,054 of those agents in Alabama's four



most populous counties. The domestics had only 1,180 of their agents in the same area, a nearly two to one ratio. This ratio was reversed in Alabama's fifteen poorest counties. There the ten largest domestic life firms had 257 agents. The foreign firms placed only 107 agents in the same area. Indeed, agents for the ten largest domestic life firms outnumbered the agents for the ten largest foreign life firms in 54 of Alabama's 65 counties. Thompson Affidavit, J.A. at 99-100.

Do domestic firms cover rural and less populated areas in Alabama better than foreign insurers? Obviously. Does the promotion of the domestic insurance industry thereby promote better insurance coverage in rural Alabama? Obviously.

b. *Enhances Greater Use of Insurance By All Citizens.* Encouraging the development of the domestic insurance industry also tends to ensure that people of all incomes will have access to insurance. The foreign life firms tend to emphasize larger policies. For example, the average ordinary life policy of Provident Life Insurance Company in Alabama is $31,201. Overstreet Affidavit, J.A. at 174. Moreover, the Wall Street Journal reported on page 9 of its December 30, 1981 issue that Metropolitan Life Insurance Company "has all but ended the home collection of premiums that once made insurance an easy buy for millions of modest income policyholders". J.A. at 174. Metropolitan Life also has placed debit agents on commission and introduced new whole-life policies with a $25,000.00 minimum face value. Indeed, in 1981 the average policy size for the ten largest foreign insurers was $16,224.00. *Id.*

Domestic life companies, on the other hand, tend to serve persons of more modest means. In Alabama, for instance, domestic companies have the major share of the in-

dustrial insurance market[8] and are responsible for increasing the number of such policies sold although the national trend is in the opposite direction. Thompson Affidavit, J.A. at 84. Moreover, in 1981, the average life policy written by the ten largest domestic insurers was only $10,949, approximately two-thirds of the average size of the foreign insurers. Overstreet Affidavit, J.A. at 174.

Do domestic insurers tend to write smaller policies for the less affluent citizens of Alabama? Yes. Could one rationally believe that promoting the growth of the domestic insurance industry could help ensure that all segments of Alabama's citizens would have access to insurance coverage? Obviously.

It has been established that the Alabama Legislature in enacting the subject statute rationally could have believed the challenged classification would forward the legitimate state purposes of encouraging investment in Alabama, encouraging the formation of new domestic companies, promoting the growth and development of the domestic insurance industry, and promoting better insurance coverage of all Alabama citizens in every area of the State. Indeed, Appellants admit the domestic industry is promoted by the statute.

Appellants apparently contend the subject classification sweeps too broadly, is too imprecise, and is both overinclusive and underinclusive. Appellants Br. at 33. However, this Court consistently has held that in the area of taxation, legislatures "possess the greatest freedom of classification". *Madden*, 309 U.S. at 88. Moreover, in *Dandridge* vs. *Williams*, 397 U.S. 471 (1970) this Court held:

[8]Industrial life policies are issued for small amounts, usually less than $1,000, and the premiums are often paid weekly or monthly to an agent who calls at the policyholder's home. J.A. at 85, n.6.



> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* vs. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L.Ed. 369, 377, 31 S. Ct. 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co.* vs. *City of Chicago*, 228 U.S. 61, 69-70, 57 L.Ed. 730, 734, 33 S. Ct. 441. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* vs. *Maryland*, 366 U.S. 420, 426, 6 L.Ed.2d 393, 399, 81 S. Ct. 1101.

*Id.* at 485. Indeed, "even if the classification involved here is to some extent both underinclusive and overinclusive and hence the line drawn by [the Legislature] imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required'." *Vance* vs. *Bradley*, 440 U.S. 93, 108 (1979).

No legislation creates classifications which cut with absolute mathematical precision. There is absolutely no doubt, however, based on the facts before this Court, that the Alabama premium tax statute could forward the proffered legitimate state purposes. Indeed, the statute has forwarded those purposes.

Appellants, by brief and through "expert" testimony offered below, attack the subject legislation on the grounds that the subject premium tax differentiation is not good for Alabama citizens, that the taxes are unwise economic policy, and that domestic insurers are, in the long run, harmed by the statute. Appellants Br. at 33, n.27; J.A. at 241-45. These allegations play no part in this constitu-

tional challenge. For instance, although acknowledging many persons believe a retaliatory tax is not an effective means of accomplishing its goal, this Court in *Western & Southern* rejected that argument stating:

> But whether *in fact* the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if the California Legislature *rationally could have believed* that the retaliatory tax would promote its objective. (citations omitted).

451 U.S. at 671-72 (emphasis in original). The Court further noted: "[T]he courts are not empowered to second-guess the wisdom of state policies. (citations omitted). Our review is confined to the *legitimacy* of the purpose." *Id.* at 670 (emphasis in original).

The test of the challenged legislation's legitimacy is *not* whether the differentiation is good policy. It is *not* whether the Legislature used the best method of achieving its purposes. It is *not* whether the Legislature could or should have done more to achieve its purpose. Rather, the test is simply whether the Alabama Legislature rationally could have believed that the premium tax differentiation would promote any of the conceivable legitimate state purposes. This burden has been met. The benefits which accrue to the State from the Alabama premium tax statute have been established. Hence, Appellants' arguments regarding the wisdom of the premium tax differential should be disregarded. So too should Appellants' argument that differentiation between domestic and foreign insurers is *per se* unconstitutional. The Alabama courts correctly followed the holding of this Court that there may be different rates of taxation between foreign and domestic companies if the classification serves a conceivable legitimate state purpose. Therefore, the judgment of the lower court should be affirmed.



## CONCLUSION

**WHEREFORE**, Appellee/Intervenors respectfully submit the judgment entered by the Supreme Court of Alabama is due to be affirmed.

Respectfully submitted,

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# APPELLEE'S

# BRIEF

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No. 83-1274

IN THE

# Supreme Court Of The United States

October Term, 1983

METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,

*Appellants,*

v.

W. G. WARD, JR., *et al.*,

*Appellees.*

On Appeal from the Supreme Court of Alabama

## BRIEF FOR APPELLEE W. G. WARD, JR.

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## QUESTION PRESENTED

Whether appellants have carried their heavy burden of negativing every conceivable legitimate state purpose for the Alabama premium tax statute.

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No. 83-1274

IN THE

# Supreme Court Of The United States

October Term, 1983

METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,

*Appellants,*

v.

W. G. WARD, JR., *et al.*,

*Appellees.*

On Appeal from the Supreme Court of Alabama

## BRIEF FOR APPELLEE W. G. WARD, JR.

### STATEMENT OF THE CASE

For more than 130 years, the State of Alabama has taxed out-of-state insurers doing business in the state at a higher rate than domestic insurers.[1] At least 31 other states[2] have imposed similar differential taxes on out-of-state and domestic insurers, relying on the long history of judicial acceptance of these statutes and recognizing the legitimate purposes which underlie them. At this late date in the history of differential premium taxation, however, a narrow band of thirty-nine self-described national insurance cor-

[1] Such differential taxation dates back to Act No. 1 [1849], Ala Acts 3.

[2] The pertinent state statutes are set forth by appellants in the Appendix to the Jurisdictional Statement at 68a.

porations seek to topple these long-standing and carefully-structured economic state regulations in an area of vital state concern by claiming that the legislature of Alabama -- and, by implication, the legislatures of 31 other states -- could not have had any conceivable legitimate purpose in enacting these statutes. Thus, appellants claim, the statutes deny these national insurers their right to equal protection. Contrary to the contentions of the appellants, however, the prior decisions of this Court confirm the judgments of the legislatures of Alabama and of the 31 other states as well as that of the courts below: There are indeed legitimate state purposes which justify differential premium taxation, and such statutes do not violate the Equal Protection Clause of the Fourteenth Amendment.

This litigation began in 1981 when thirty-nine (39) insurance companies -- not qualifying as domestic insurers under Alabama law[3] -- brought suit in the Circuit Court of Montgomery county, Alabama ("the trial court"), challenging Alabama's differential premium tax statute, Ala. Code §§ 27-4-4, *et seq.* (1975), as a denial of equal protection. That statute taxes the premiums of out-of-state insurers at a different rate than that applied to the premiums of insurers which are both incorporated in Alabama and which also maintain their principal places of business within the state. The statute also permits these foreign, but not the domestic, insurance companies to *reduce* their tax lia-

[3]In order to qualify as a "domestic insurer" under Alabama law, and therefore for the lowest tax rate available, not only must an insurance company be incorporated in Alabama, but it must also maintain its "principal office and chief place of business" within the State. Ala. Code § 27-4-5 (1975). (Those insurers which qualify for the lowest tax rate by fulfilling both of the above requirements will sometimes hereinafter be denominated as "domestic" insurers. All other insurers, which category includes both Alabama and non-Alabama insurers, will be referred to as "foreign" or "out-of-state" insurers.) The Alabama statute appears in the appendix to appellants' Jurisdictional Statement at p. 54a-57a.



bility (and thus the State's revenue-raising potential) through capital investment in certain Alabama assets and governmental securities.[4]

Throughout this litigation, all parties have agreed that the appellants' equal protection challenge must be resolved by the two-step rational basis analysis prescribed by this Court in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981) ("*Western & Southern*"). *Western & Southern*, much like the case at bar, involved an equal protection challenge to a statute that taxed certain out-of-state insurance companies at a higher rate than that at which domestic California insurers were taxed. In sustaining the validity of the California statute, this Court articulated a two-tiered rational basis analysis for resolving equal protection challenges to differential tax legislation: (1) whether the challenged legislation had a legitimate state purpose; and (2) if so, whether it would have been reasonable for the legislature to believe that the statute would promote the purpose. 451 U.S. at 668.

Acknowledging that this two-step rational basis inquiry constituted the proper analysis, the trial court on February 19, 1982, ordered the State to furnish a list of conceivable state purposes for enacting the challenged legislation. The State responded with a list of 14 conceivable purposes for the enactment of the statute, and the intervenors -- various domestic insurers -- provided a list of three additional legitimate state purposes.[5] Subsequently, the parties filed cross-motions for summary judgment before the trial court. On May 17, 1982, the trial court granted summary judg-

[4]See text at 39-46, *infra*, for a discussion of the legitimate purposes served by this investment incentive.

[5]The State's list of purposes is set forth in the Joint Appendix at 27. The Intervenors' list of three additional purposes is set forth in the Joint Appendix at 32.

ment in favor of the State, holding that in addition to raising revenue (which, by definition, all tax statutes do), the Alabama premium tax statute had at least two legitimate purposes: (1) encouraging the formation of new insurance companies in Alabama; and (2) encouraging capital investment by foreign insurance companies in certain governmental securities and Alabama assets. The trial court also found for the State on the second *Western & Southern* inquiry, holding that the Alabama legislature could reasonably have believed that the statute's classification would promote the legitimate purposes.

Appellants, following an unsuccessful motion for a new trial, appealed the judgment to the Alabama Court of Civil Appeals. On April 27, 1983, that court affirmed the trial court's ruling with respect to the legitimacy of the purposes behind the statute, but also held that the rational relationship issue had been prematurely decided through summary judgment. Therefore, the court remanded the case for a trial on the second *Western & Southern* inquiry and the factual issues presented pursuant thereto.

Both sides then petitioned the Alabama Supreme Court for a writ of *certiorari*. Appellants sought review of the first *Western & Southern* inquiry, whether the state purposes were legitimate, and the State sought review of the appellate court's remand order. On September 23, 1983, all petitions for certiorari were denied, thus leaving intact the ruling of the Court of Civil Appeals.

At this point, appellants elected to forego an evidentiary hearing and to concede that the second prong of the *Western & Southern* test -- whether it would have been reasonable for the legislature to believe that the statute would promote the suggested purposes -- had been satisfied on the facts of this case. They did so through a joint stipulation



and motion with the State, thereby waiving their rights to a trial on all factual issues presented and consenting to the entry of judgment in favor of the State, reserving their rights to contest the legal, but not the factual, issues of this case. *See* Appendix to Appellants' Jurisdictional Statement at 2a. On the basis of this stipulation and waiver, the Alabama Supreme Court on November 10, 1983, entered a judgment denying appellants' challenge to the Alabama premium tax statute. It is this judgment from which this appeal has been taken.

Thus, it has been stipulated that Alabama's differential premium tax satisfies the second part of the two-step rational basis test prescribed by *Western & Southern*, and appellants concede that their stipulation effectively forecloses them from now reopening "the factual question whether the legislature could have believed that the challenged statutory classification would advance its alleged purposes." Reply Brief of Appellants (to the State's Motion to Dismiss or Affirm) at 9. The sole question on appeal, then, is whether the suggested purposes of the Alabama premium tax statute are legitimate, given the conceded fact that the legislature could reasonably have believed that the statute's differential taxation of domestic and foreign insurers would promote those purposes.[9]

---

[9]Despite their concession that the statute could reasonably be expected to promote the suggested purposes, appellants at various points in their brief have attempted to direct the Court's attention to an alleged "loose fit" of the statute to its suggested goals. *See, e.g.*, Brief for Appellants at 29-30. This is a disingenuous attempt to reopen the factual issues they conceded below, issues not properly before this Court. Aside from that, however, appellants' belated complaint that the statute is ineffective in achieving its suggested goal falls wide of the mark. "[W]hether in fact the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if we conclude that the . . . Legislature *rationally could have believed* that the . . . tax would promote its objective." *Western & Southern*, 451 U.S. at 672. (emphasis in original). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Vance*

## SUMMARY OF ARGUMENT

The validity of Alabama's differential tax policy challenged by appellants must be measured under the Equal Protection Clause alone. Neither the Commerce Clause, nor the Privileges and Immunities Clause, is applicable to the case at bar. *Western & Southern*, *supra*, 451 U.S. at 653-56. The standard of review under the Equal Protection Clause is one of minimal scrutiny — so long as the statute may reasonably be thought to further a legitimate state purpose, it must be sustained. *Western & Southern*, *supra*, 451 U.S. at 672; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). In this regard, appellants' burden is to negative every conceivable purpose which might support the statute, *Madden v. Kentucky*, 309 U.S. 83, 88 (1940), and the statute must be upheld so long as "... any state of facts reasonably can be conceived that would sustain it." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528 (1959). Thus, in determining whether appellants have met their burden in challenging the statute, it is necessary not only to consider the statutory purposes which the courts below determined to be legitimate, but all other statutory purposes which may reasonably be conceived as well. *Cf., Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970) ("The prevailing party may, of course, assert in a

*v. Bradley*, 440 U.S. 93, 111 (1979). "Parties challenging legislation under the Equal Protection Clause cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.'" *Western & Southern*, 451 U.S. at 674 [*quoting United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)]. Moreover, "a statutory classification impinging upon no fundamental interest . . . need not be drawn so as to fit with precision the legitimate purposes animating it. . . . That [the state] might have furthered its underlying purposes more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 390 (1978) [*quoting Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976)].



reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court"). Unless each of these purposes is demonstrated to be illegitimate, appellants' equal protection challenge must fail.

Appellants have not and cannot meet their heavy burden. As is demonstrated *infra*, the challenged statute furthers many legitimate state purposes, including the promotion of the domestic economy, the encouragement of capital investment in Alabama, and the protection of Alabama's insureds. The statute has also been shown to promote the use and availability of insurance within the State. It is beyond argument that these constitute legitimate state interests, and the statute is therefore due to be sustained.

The Alabama statute is also due to be sustained because of the mandate of the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015 (1982), which declared the business of insurance to be "... a local matter, to be subject to and regulated by the laws of the several states. ..." H. R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945). Appellants, through this litigation, are in truth asking the Court to second-guess the wisdom of Congress and, because it serves appellants' narrow economic interests, to strike down the regulatory efforts of the several states in favor of national uniformity in the regulation and taxation of the business of insurance. As this Court recognized in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 431 (1946), however, Congress, through McCarran-Ferguson, "... intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance. ..." Thus, appellants' challenge to the Alabama statute should be denied as contrary to the legislative intent of Congress. This is particularly so where, as here,

the State has shown both economic and social justifications for the choices made by the statute.

## ARGUMENT

As noted in the Statement of the Case, the only issue this Court is now called upon to decide is whether the challenged premium tax statute has a legitimate purpose and is therefore constitutional. Moreover, it should be emphasized that the only constitutional provision in issue is the Equal Protection Clause of the Fourteenth Amendment. Since the appellants are corporations, the Privileges and Immunities Clause of the Fourteenth Amendment is inoperative in the case at bar. *See, Western & Southern*, *supra*, 451 U.S. at 656. Similarly, while the Commerce Clause would ordinarily restrict a state's efforts to tax foreign companies at a higher rate than domestic ones in order to promote the local economy, *see, Bacchus Imports, Ltd. v. Dias*, ___ U.S. ___, 104 S. Ct. 3049, 3056, 82 L.W. 4979, 4981 (1984), Congress has the power to confer upon the states exemptions from Commerce Clause restrictions, and it has elected to exercise that power with respect to the business of insurance. In enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015, Congress declared that because of the peculiar local concerns at stake, uniformity of regulation and taxation were not required with respect to the business of insurance. Congress thereby removed all Commerce Clause limitations on the states' powers to differentiate between foreign and domestic insurance companies in the field of taxation and regulation. *See Western & Southern*, *supra*, 451 U.S. at 656.

In the absence of Congressional authority, legislation discriminating against foreign industry may be invalidated under the Commerce Clause itself, as in *Bacchus Imports*,



*Ltd. v. Dias*, *supra*, or it may be invalidated under the Equal Protection Clause if the state's means of promoting its domestic industry through differential taxation is illegitimate as violative of the Commerce Clause, and the statute is therefore unable to meet the first prong of the equal protection rational basis test (that the state purpose must be legitimate). Where, however, the Commerce Clause is inapplicable (as here), or otherwise not offended, states may permissibly distinguish between foreign and domestic concerns in order to promote legitimate state interests. *See* text, *infra* at 29-30, and cases cited therein.

Thus, the validity of Alabama's differential tax policy must be measured by the Equal Protection Clause alone. The standard of review is sometimes called minimal scrutiny – so long as the statute can rationally be thought to further a legitimate state purpose,[7] it must be sustained. *Western & Southern*, *supra*, 451 U.S. at 672; *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at 466. In this regard, the burden is on appellants to negative every conceivable purpose which might support the statute. *Madden v. Kentucky*, *supra*, 309 U.S. at 88. Where, as here, the challenged statute is silent as to its purposes on its face, it is "settled that a classification, though discriminatory, is not arbitrary or violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be *conceived* that would sustain it." *Allied Stores of Ohio v. Bowers*, *supra*, 358 U.S. at 528 (emphasis supplied) (citations omitted). *Accord, United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *Dandridge v. Williams*, *supra*, 397 U.S. at 485; *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Kotch v. Board of*

[7] As noted *supra* at 5, it is conceded here that the statute is rationally related to its suggested purposes. Therefore, the only remaining issue is whether any of those purposes is legitimate.

*River Port Pilot Commissioners*, 330 U.S. 552, 556-64 (1947).

Thus, in determining whether Alabama's differential premium tax is consistent with the Equal Protection Clause, it is necessary to consider not only the purposes which the courts below determined to be legitimate, but all other statutory purposes which may reasonably be conceived.[8] Moreover, in evaluating each conceivable purpose, it must be remembered that ". . . the courts are not empowered to second guess the wisdom of state policies . . . [The Court's] review is confined to the *legitimacy* of the purpose." *Western & Southern*, *supra*, 451 U.S. at 670 (1981) (citations omitted) (emphasis original). This is particularly true with respect to states' taxing powers, since this Court has long recognized that in the field of taxation, more than any other field, the states possess the greatest freedom of classification. *Lenhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973); *Madden v. Kentucky*, *supra*, 309 U.S. at 88.

Many of the purposes behind Alabama's differential premium tax are contained in the State's List of Legitimate State Purposes of Alabama's Differential Premium Tax Policy and Offer of Proof Relating Thereto ("State's List of Purposes"), compiled at the request of the trial court and set forth in the Joint Appendix at 27. Other purposes are found in the Intervenors' List of Legitimate State Purposes of Alabama's Differential Premium Tax State and Offer of Proof Relating Thereto ("Intervenors' List of Purposes"), which is set forth in the Joint Appendix at 52.[9]

[8]*See* n. 12, *infra*.

[9]An economic analysis of the relation between the statute and these purposes is contained in the Affidavit of Arthur A. Thompson, Jr., Ph.D., Exhibit II: A study of the "State Purposes and Effects of a Differential Premium Tax Policy for Foreign and Domestic Insurance Companies" is set forth in the Joint Appendix at 64-114 (the "Thompson Study"). A related study of the purposes and effects of Alabama's differential premium tax policy for foreign and domestic insurers entitled "An Economic Analysis of the Premium Tax Differential in Alabama" is found in the Affidavit of George A. Overstreet, Jr., Ph.D., set forth in the Joint Appendix at 140-82.



Unless these purposes, and all others that may reasonably be conceived, are each demonstrated to be illegitimate, appellants' equal protection challenge must fail.[10]

## I. Promoting The Development And Viability Of The Domestic Insurance Industry Serves Legitimate State Purposes Properly Sustained Below.

### A. *This Court's Decisions Establish the Legitimacy of Such Purposes.*

As previously noted, the courts below held that there were at least two legitimate purposes behind Alabama's differential premium tax. The first of these purposes was that of encouraging the formation of new domestic insurance companies in Alabama. Not only is this a legitimate purpose in itself, but, as appellants candidly concede, it is also "a step in achieving the larger set of purposes suggested by [the State], such as benefitting the local economy and bettering the welfare of the citizens of Alabama." Brief for Appellants at 31. More specifically, these interrelated purposes – all of which derive from promoting the development, growth and viability of the domestic insurance industry – include the following legitimate state purposes suggested below:[11]

[10]The State does not view the *amicus* brief of the Life Insurance Council of New York or the *amicus* brief of the States of Connecticut, Rhode Island, Massachusetts and New Hampshire as presenting any argument not contained in the Brief of the Appellants; therefore, this brief directly addresses only the arguments in appellants' brief.

[11]*See* Joint Appendix at 27-33 for a list of 17 statutory purposes contained in the State's List of Purposes and the Intervenors' List of Purposes. Each of these statutory purposes was considered by the courts below.

(Alabama) 1. To encourage the formation of new insurance companies domiciled within Alabama, thereby gaining the economic benefits that the added job opportunities, employment, and payrolls can provide to the Alabama communities in which such headquarters facilities may be located.

(Alabama) 2. To create a more lively and vigorously competitive market for insurance within Alabama by promoting the growth and development of domestic insurance companies capable of competing on an equal footing with well-established, out-of-state companies. The existence of viable domestic insurance companies adds a new and important source of competition for large, nationally-known companies; having both foreign and domestic companies in vigorous competition with each other for customer patronage makes the insurance marketplace more contestable and increases the likelihood that all insurance companies (both foreign and domestic) will have to provide more attractive rates and levels of service to the general public.

(Alabama) 3. To extend the range of customer choice among alternative insurance companies. The existence of healthy, viable domestic insurance companies gives the general public a wider range of both companies and types of policies to choose from in selecting what kinds of insurance coverage and insurance service best suits their needs.

(Alabama) 4. To make it economically feasible for young, relatively small domestic companies to compete on a more nearly equal footing with large, well-established, out-of-state companies.



(Alabama) 5. To reduce the barriers to entry into the insurance industry.

(Alabama) 6. To encourage more insurance to be sold in Alabama, with the result that more Alabama citizens gain access to the many benefits that adequate insurance protection provides.

(Alabama) 7. To promote a greater level of average insurance coverage per family in Alabama.

(Alabama) 8. To enhance the use of insurance by Alabama families.

(Alabama) 9. To enhance the degree to which Alabama families and Alabama businesses will elect to insure themselves against such disasters as fire, natural disaster, theft, casualty losses, accidents, and other such calamities as may render them debilitating financial losses. To the extent that differential premium tax policies can be used to create a domestic insurance industry that, in turn, enhances competition in the property and casualty insurance industry in Alabama, then the more likely it is that Alabama families and Alabama businesses will be attracted to insure themselves adequately against insurable types of calamities. The benefits and protection that such coverage affords redounds to the benefit of the general public and lessens the burden that calamities might otherwise impose on state and local governments and thus upon Alabama taxpayers.

(Alabama) 10. To promote greater use of insurance of all types in rural and sparsely populated sections of Alabama -- market segments which usually are ignored by large, foreign companies but which may well be attractive

companies, on average, reinvest a far higher proportion of their admitted assets in Alabama than do foreign companies. One of the purposes of differential premium taxation in Alabama is thus to help redress the adverse impact which foreign companies have on the State's economy as concerns the use of the premium income they obtain in Alabama and their relative disinclination to invest in Alabama's underdeveloped economy. Achieving a higher degree of economic parity with the rest of the states in the United States has for many years been one of the State's foremost goals.

(Intervenors) 9. To promote the availability of insurance of all types in all areas of the State of Alabama.

In addition to these legitimate purposes suggested above, the formation of new domestic insurance companies in Alabama helps to accomplish the legitimate purpose as well,[9] of ensuring greater State direction and control over insurance companies doing business in the State. This Court long ago noted that states have greater control over and are better able to police and regulate domestic as opposed to foreign corporations. *Board of Education v. Illinois*, 203 U.S. 553, 562 (1906).[10] This is important in protecting Alabama's insureds against insurance fraud, mismanagement of funds, unfair settlement practices, and other unlawful or unethical practices. Moreover, this greater degree of control helps to ensure that in the event of sudden

[9]It is well settled that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (and cases cited therein).

[10]See text at 61-62, *infra*, discussing the benefits which the State derives from the easier regulation of domestic companies.



to small, domestic companies if concentrating on such "vacant niches" can be made economically feasible.

(Alabama) 12. To promote the growth and development of a domestic insurance industry, thereby realizing the general economic and public benefit that derives from the fact that domestic insurance companies typically invest a far higher percentage of their admitted assets in Alabama than do foreign companies. Alabama's efforts to achieve economic parity with other, more economically-advanced states is materially enhanced by differential premium taxation because of the general practice of domestic insurance companies to direct significantly higher percentages of their investment capital to in-state projects. Domestic insurance companies are therefore a very important source of capital for financing projects that benefit the citizens of Alabama and that contribute to a faster rate of economic growth within the State.

(Alabama) 13. To lessen the adverse impact which foreign insurance companies have on the economy of Alabama. Foreign insurance companies collect far more insurance premiums from Alabama policyholders than they reinvest in Alabama. By channeling the premiums collected in Alabama to investments and purposes outside of Alabama, the activities of foreign insurance companies have an adverse impact on economic growth with the State – much needed funds are being withdrawn from the State's economy at the very time when such funds are desperately needed to help boost economic activity with the State. In contrast, it is well known that domestic insurance

or impending failure of an insurance company, the State will be in a better position to protect the interests of Alabama's insureds by seizing the company's assets or taking other appropriate action.[14] Enabling states to obtain such local control over insurance companies was one of Congress' primary goals in enacting the McCarran-Ferguson Act. *See* H.R. Rep. No. 143, 79th Cong., 1st Sess., 2-3 (1945).

Thus, the formation and growth of new insurance companies in Alabama is not only a valid state purpose in and of itself, but it is also a vital link in achieving a host of other valid state purposes. As appellants themselves concede, the courts below implicitly recognized that "domestic insurance companies, on the whole, benefit the state in ways which foreign companies do not." Brief for Appellants at 31. Accordingly, the courts below held that Alabama's differential premium tax does not violate the Equal Protection Clause.

Appellants have conceded that Alabama's differential premium tax is rationally related to the benefits derived from a vigorous domestic insurance industry. Their expert, Alfred E. Hofflander, Ph.D., found, as an expert conclusion, that one effect of the statute is the "entry into the market of those potential domestic firms, whose operations will be made profitable . . . as new domestic firms." Joint Appendix at 260. Dr. Hofflander also unequivocally stated that the differential taxation ". . . could be expected to help create (Alabama 5) and promote the intrastate growth of (Alabama 4) domestic insurance companies." Joint Appendix at 266-67. While thus conceding that the Alabama statute promotes the listed purposes, *see* Appendix of Jurisdictional Statement at 2a, appellants now, however, take

[14]*See* text, *infra* at 41-42, for further discussion of this point.



issue with the finding of the courts below that promotion of domestic industry in these respects constitutes a legitimate state purpose.

Contrary to appellants' contentions, however, encouraging the growth and development of domestic industry and the pursuit of the benefits related thereto are self-evidently legitimate.[15] As long ago as 1906, this Court declared that a state may employ differential taxation in order to encourage an activity ". . . to be exercised or . . . bestowed within her borders and for her people, whether exercised through persons or corporations." *Board of Education v. Illinois*, *supra*, 203 U.S. at 565. There, the Court held that Illinois' exemption of domestic charitable and educational institutions from the burden of an inheritance tax imposed upon similar foreign corporations did not violate the Equal Protection Clause. The Court unequivocally stated that "[r]egarding alone the purposes of the institutions, no difference may be perceived between them, but regarding the spheres of their exercise, and the benefits derived from their exercise, a difference is conspicuous. It is this benefit that may have constituted the inducement of the legislation." 203 U.S. at 561.[16] The Court also emphasized the

[15]Appellants argue that the purpose of promoting domestic industry cannot legitimately justify differential taxes because, if it did, ". . . the purpose of promoting domestic companies would always support treating foreign companies less favorably." Brief of Appellants at 31, n. 19. This sweeps too broadly and does not stand analysis; such an argument patently ignores the fact that the insurance field is unique in that the Commerce Clause is irrelevant to the states' regulation of that business. In many instances, the Commerce Clause applies and might render illegitimate a state's efforts to promote its own domestic industry through unfavorable treatment of foreign industry. *See, e.g., Buckeye Imports, Ltd. v. Ohio*, *supra*. Where, however, as here, the Commerce Clause is inapplicable, the legitimate state purpose of promoting domestic industry can support and justify disparate treatment of domestic and out-of-state interests.

[16]The foreign educational institution in *Board of Education v. Illinois* did not have or maintain an office or engage in charitable work in

broad powers of the state to tax inheritances, and ". . . the greater control and direction the state had over domestic than over foreign corporations." *Id.* at 562. [17]

Here, as in *Board of Education* v. *Illinois*, it is not the mere fact of out-of-state or domestic incorporation, but the peculiar benefits to the State than can only be derived from domestic insurance companies that "constituted the inducement of the legislation." *Id.* Those unique benefits include added jobs and payrolls, a wider range of available services and policies, a more competitive insurance market, better service of sparsely populated rural areas, a greater degree of control and regulation by the State, and numerous other related benefits. *See* text, *infra* at 51-55. Indeed, it is obvious from the face of the statute that the legislature had in mind the distinct benefits offered by domestic insurers when it enacted the Comprehensive Insurance Code[18] of which the challenged statute is a part, for not only must an insurer be incorporated in Alabama, but it must also maintain its principal place of business, and with certain limited exceptions, its assets, within the State as well if it is to reap the benefits of the lower domestic tax rate. There could be no more obvious indication that it is this distinct set of benefits which the State derives from domestic insurance companies, and not a desire to raise revenue at the expense of out-of-state companies, that provided the actual basis for the enactment of Alabama's differential

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Illinois. In fact, (i) funds were required to be expended within Kentucky, its state of domicile. 205 U.S. at 558.

[17]Much as they do with respect to charities and to education, the states have broad regulatory powers with respect to the regulation and taxation of the business of insurance. See text at 46, *infra*.

[18]Act No. 687 [1971], Ala. Acts 707 (Vol. II), cited at pp. 10-11 of the State's Brief before the Alabama Court of Civil Appeals. That brief is part of the record but was not reprinted in the appendix.



premium tax.[19] *Board of Education* v. *Illinois* is indelible proof that such a purpose is indeed legitimate.

*Board of Education* v. *Illinois* does not stand alone in establishing the legitimacy of a state's purpose to promote domestic industry and to obtain the benefits attendant thereto. In another much-cited case, this Court declared without qualification that "[t]he legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937). In *Carmichael*, two foreign corporations challenged an Alabama statute which taxed certain employers but not others. Though the tax concededly discriminated against the out-of-state plaintiffs, the Court found the discrimination permissible under the Equal Protection Clause: "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, (citations omitted), or to restrict or suppress the other." 301 U.S. at 512 (citations omitted). The teaching of *Carmichael* is clear: If a state legislature perceives that an enterprise (such as the domestic insurance industry) is particularly beneficial to the state's local interests, that enterprise may be exempted from tax or taxed at a lower rate without violating equal protection guarantees, because promotion of beneficial enterprises constitutes a legitimate state interest.[20]

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[19]The fact that only those insurance companies which are both incorporated in Alabama and which maintain their principal places of business in the State are taxed at the lower domestic rate is evidence that the desire to achieve the peculiar benefits offered by domestic insurers was not only a conceivable purpose of the statute, but an actual one as well.

[20]In most cases, of course, the Commerce Clause would render a state's promotion of its own domestic industries based on a disparate treatment of foreign enterprises illegitimate. But where Congress has chosen to specifically remove Commerce Clause barriers -- as it has done with regard to the insurance industry -- such distinctions in pursuit of local interests become entirely acceptable. Indeed, Congress could have had little else in

Any doubt about the legitimacy of distinctions designed to promote the growth and development of domestic enterprises was removed by *Allied Stores of Ohio v. Bowers*, *supra*, wherein this Court stated that it was "... entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." 358 U.S. at 528. *Bowers* involved an Ohio statute which exempted from taxation "... merchandise or agricultural products belonging to a nonresident ... if held in a storage warehouse for storage only." 358 U.S. at 525. Ohio residents, on the other hand, were subject to taxation on such property, and one of them challenged the statute. This Court, recognizing that "... states have a wide discretion in the laying of their taxes ... [.]" both to "... ensure revenue and foster their local interests ... [.]" and that the Equal Protection Clause "... imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation ... [.]" 358 U.S. at 526, squarely sustained the legitimacy of tax discrepancies designed to encourage the formation and development of domestic commerce.

Noting that one obvious purpose of the statute was "... to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the state's economy ... [.]" and that it therefore could not be said that the discrimination "... was not founded upon a reasonable distinction or difference in state policy ... [.]" the Court held that equal protection guarantees were not offended. 358 U.S. at 528-29. If, in the above quote, the words "incorporation and headquartering of insurance companies" are substituted for the words "construction or leasing and operation of warehouses," the applicability of the *Bowers* case becomes strikingly apparent. Where, as here, the Commerce Clause does not render the purpose an impermissible and hence illegitimate (*compare Baccus Imports, Ltd. v. Dias*, *supra*; with *Western & Southern*, *supra*; with *Bowers*, *supra*; and with *Prudential Insurance Co. v. Benjamin*, *supra*), the policy of encouraging the development of a domestic industry is legitimate under applicable equal protection standards.

Appellants struggle to distinguish *Bowers* as involving "... tax provisions that reward nonresidents for entering the state to do business ..." and thus discriminate against residents rather than in favor of them. Brief for Appellants at 31, n.25 (emphasis of Appellants). Nothing in the Equal Protection Clause, however, indicates that a purpose which is legitimate when urged in support of a discrimination that favors nonresidents becomes illegitimate when urged in support of a distinction that disfavors nonresidents. What the appellants appear to be arguing is that nonresi-

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moval when it passed the McCarran-Ferguson Act and thereby exempted taxation of the insurance business from the restrictions of the Commerce Clause. If, as appellants seem to contend, the Equal Protection Clause were coextensive with the Commerce Clause in this regard, Congress accomplished little, if anything, by its passage of the Act. But contrary to appellants' contentions, this Court has recognized that the Constitution could grant Congress the power to validate certain otherwise unconstitutional provisions of state laws "... by removing obstacles to state action arising from its own action or by consenting to such laws." *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430-31 (1946).

Moreover, this Court recognized in *Benjamin* that Congress in passing the McCarran-Ferguson Act "... intended to declare, and to effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance ... [.]" and that the statute in this regard was clearly intended to validate differential provisions which taxed foreign insurance companies more heavily than domestic ones. See 328 U.S. at 431-32 n.40 (specifically citing Ala. Code (1940), title 51, §§ 818, 819 -- the predecessor of the very statute now in issue -- as one of the many domestic preference taxes Congress intended to validate when it passed the McCarran-Ferguson Act).

dent businesses are somehow *more equal* than resident businesses for equal protection purposes and thus are entitled to *greater* protection. This proves too much. Residence does not constitute a suspect classification, *cf.*, *Western & Southern*, *supra*, 451 U.S. at 667, n.21, and the standards of equal protection are the same regardless of whether the distinction favors or disfavors nonresidents. Though Justices Brennan and Harlan, in their concurring opinion in *Bowers*, argued that whether the tax discriminated against residents or nonresidents ought to affect the outcome,[9] this Court in *Western & Southern* flatly rejected any such distinction. 451 U.S. at 667, n.21. In the face of the *Western & Southern* holding, appellants' effort to distinguish *Bowers* amounts to little more than Commerce Clause rhetoric in equal protection clothing; while the question of whether nonresidents or residents are the disfavored group may have relevance in the Commerce Clause area, it has no application for equal protection purposes. Appellants cannot escape the direct teaching of *Bowers*: a statute which encourages the location within the state of a needed or useful industry through differential taxation is neither arbitrary nor invidious and does not violate the Equal Protection Clause.

This Court's decision in *Western & Southern*, *supra*, demonstrated once more that a state's promotion of a local or domestic industry is a legitimate purpose which justifies differential tax treatment under the Equal Protection Clause:

> This Court has recognized the legitimacy of state efforts to maintain the profit level of a domestic industry, *Purity v. Bowers*, 317 U.S. 501, 503-507, 87 L.Ed. 915, 63 S.Ct. 307 (1943), and of efforts to "protect and enhance the reputation" of a domestic industry so

[9] 398 U.S. at 588.



> that it might compete more effectively in the interstate market, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143, 25 L.Ed. 2d 174, 90 S.Ct. 844 (1970). *California's effort on behalf of its domestic insurance industry is no less legitimate.*

451 U.S. at 671 (emphasis supplied). The Court unequivocally held that California's promotion of its *domestic insurance industry*, through differential taxation based solely on place of domicile, was indeed a legitimate state purpose placing the discrimination worked by the differential tax outside the bar of the Equal Protection Clause. That is, of course, the very issue presented in this case, and the courts below resolved the issue exactly as this Court did in *Western & Southern*.[10] The correctness of the holdings below could scarcely be more apparent.

Appellants, perhaps realizing that the *Western & Southern* holding deals their position a fatal blow, go to great

[10] Appellants attempt to distinguish the statute sustained in *Western & Southern* from the State's statute by alleging that the former did not contain the raising of revenue as one of its purposes, while the latter did contain such a purpose. Brief of Appellants at 17-18. This is a distinction without substance.

Not only do all tax statutes inherently function to raise revenue, but, if the *Western & Southern* statute did not, in fact, have the raising of revenue as one of its purposes, it would not have erected *higher taxes* against insurers from states imposing tax rates higher than California's, but would have instead or in addition provided *rebates* to insurers from states which imposed taxes at rates equal to or lower than the California rate. Rather than provide for a rebate, however, the statute provided for an added tax, which by definition raised *additional revenue*.

In any event, the practical effect of the tax sustained in *Western & Southern* was to impose a higher tax rate on insurers from at least 26 other states than the tax rate which California imposed on its own domestic insurers. This Court's validation of the tax in *Western & Southern*, which openly discriminated against the insurers of at least 26 other states, therefore confirms the validity of Alabama's premium tax, which favors only those Alabama companies which also maintain their principal places of business within the State. The *Western & Southern* statute, of course, favored *all* of California's domestic insurers, as well as select others, by taxing insurance companies from at least 26 outside states at a higher rate.

rendered inapplicable by the express will of Congress, the only limitation on the means by which states can pursue legitimate state purposes is that expressed in *Western & Southern* – the means must be rationally related to achieving the purposes. That, of course, is conceded here.

Other cases are in accord with the proposition that the promotion of a beneficent domestic enterprise constitutes a legitimate state interest. As appellants candidly recognize, Brief for Appellants at 31, the Court in *Parker v. Brown*, 317 U.S. 341 (1943), sustained a regulatory measure which was specifically designed to "encourage local business activity." That case involved a California statute which regulated the marketing of the California raisin crop, a statute ultimately sustained under a Commerce Clause challenge. In the course of its opinion, this Court made clear that a state has a legitimate interest in promoting its local industries and enhancing their ability to operate profitably: ". . . [T]he production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries." 317 U.S. at 365.[20] The Supreme Court in *Parker* expressly recognized, under a demanding Commerce Clause analysis,[20] that the economic encouragement of a domestic industry is indeed a legitimate state purpose.

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[20]The pertinence of this language from *Parker v. Brown* is made all the clearer when it is compared with Congress' declaration (in the legislative history of the McCarran-Ferguson Act) that the business of insurance is "a local matter, to be subject to and regulated by the laws of the several states." H.R. Rep. No. 143, 78th Cong., 1st Sess., 2 (1945). Thus, it too "demand[s] state action." *Parker*, 317 U.S. at 365.

[20]That Commerce Clause scrutiny is far more rigorous than rational basis scrutiny under the Equal Protection Clause has been recognized by at least one member of this Court and commentators alike. *See, e.g., Kassel v. Consolidated Freightways*, 450 U.S. 662, 705 n.1 (1981) (Rehnquist, J., dissenting). *See also* Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Dis-*



lengths to explain it away with yet another cloud of Commerce Clause rhetoric. They argue that *Western & Southern* confers legitimacy on a state's purpose to promote the domestic insurance industry only if the *means* chosen in furtherance of that purpose also have the effect of promoting interstate commerce and not "burdening" it. Appellants must fail to appreciate the fact that Congress made an informed choice to authorize state taxes and regulations that burden interstate commerce in the insurance field when it passed the McCarran-Ferguson Act, and they thus simply confuse Commerce Clause with equal protection analysis. *Western & Southern* clearly demonstrates that promoting a domestic insurance industry is a legitimate state purpose, and that any means rationally related to achieving that purpose will withstand equal protection scrutiny. The fact that the means Alabama has chosen may arguably restrict or burden interstate commerce is wholly irrelevant given the McCarran-Ferguson Act. The Court itself made this clear in *Western & Southern* when it said that ". . . Congress may 'confer upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy[.]'" and held that Congress had conferred just such an ability on the states with respect to the insurance industry. 451 U.S. at 652-55, *quoting Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

The Court reiterated this in *Bacchus Imports, Ltd. v. Dias*, *supra*, where, *in the context of a domestic preference tax*, the Court said "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the *means* by which a State can constitutionally seek to achieve that goal." ___ U.S. at ___, 104 S. Ct. at 3056, 52 L.W. at 4981 (emphasis supplied). With the Commerce Clause

*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), also demonstrates that a state has a very real and legitimate interest in the welfare of its domestic industry. In upholding — again under the narrow strictures of the Commerce Clause — the validity of an Arizona statute regulating the packaging of produce grown within the state, the Court noted that the statute's "... purpose and design are simply to protect and enhance the reputation of growers within the State. *These are surely legitimate state interests.*" 397 U.S. at 143 (emphasis supplied). This recognition that a state has a legitimate interest in the welfare and reputation of its domestic industries leads to the inescapable conclusion that Alabama does, indeed, have a legitimate state interest in promoting its own domestic insurance industry.

These cases and others[25] amply demonstrate that Alabama's desire to promote the domestic insurance industry and to obtain the benefits attendant upon the growth and development of that industry are legitimate state purposes legally sufficient to support the differential premium tax.

### B. *The Cases Cited By Appellants Are Inapposite.*

Numerous decisions of this Court make it clear that promotion of a beneficial domestic industry is indeed a legitimate state purpose. Appellants, however, strive repeatedly to distinguish this precedent by citing Commerce Clause arguments and decisions wholly dependent upon them.[26]

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*criminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 Vand. L. Rev. 673, 725 (1978).

[25] *See, e.g., Bacchus Imports, Ltd. v. Dias*, *supra*, ____ U.S. ____, 104 S. Ct. at 3056, 52 L.W. 4979, 4981 (1984) ("[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 350-57 (1977) (upholding state of Washington's creation of a state agency to promote the state's apple industry).

[26] *See* text at 28-30, *supra*, for a discussion of the irrelevance of appellants' Commerce Clause arguments.



They argue that *Allied Stores of Ohio v. Bowers*, *supra*, only conferred legitimacy upon "tax provisions that reward *non-residents* for entering the state to do business" and thus discriminate against residents rather than nonresidents. They fail to mention, however, that their proffered distinction was expressly repudiated by this Court in *Western & Southern*, *supra*, 451 U.S. at 667, n.21.

Similarly, appellants make Commerce Clause arguments in their effort to distinguish *Western & Southern*. They claim that this pivotal decision authorizes a state to promote domestic industry only when there is no attendant burden on interstate commerce, Brief of Appellants at 17-18, but in doing so they simply ignore Congress' choice, through the McCarran-Ferguson Act, to "... confe[r] upon the States an ability to restrict the flow of interstate commerce that [the States] would not otherwise ... *enjoy*." *Western & Southern*, *supra*, 451 U.S. at 652. *See also*, text at 8-9, *supra*.

Perhaps the most subtle attempt of appellants to inject irrelevant Commerce Clause concerns into the Court's consideration of this case, however, is their claim that *Southern Railway v. Greene*, 216 U.S. 400 (1910) and its progeny stand for the proposition that a state's efforts to promote domestic industry through differential taxation are somehow *per se* illegal. *See* Brief of Appellants at 12-19. This is erroneous, and the failure on the part of appellants to recognize the true basis of the *Southern Railway* line of cases leads them to overstate and misconstrue the relevance of what they correctly, but irrelevantly, describe as an "unbroken line of precedents." Brief of Appellants at 11.

The *Southern Railway* case involved a state tax levied on foreign but not domestic corporations, and the Court did indeed invalidate the tax as violative of the Equal Protection Clause. The Court did not, however, invalidate the

tax because the *purpose* of promoting domestic industry was illegitimate; rather, as the Court carefully explained in *Western & Southern*, the holding was premised upon the Commerce Clause concerns relevant to that case but which are, by mandate of Congress, conspicuously absent here. *Western & Southern*, *supra*, 451 U.S. at 662 n.14 (noting that the *Southern Railway* opinion relied on two Commerce Clause cases decided earlier that term).

As *Western & Southern* makes clear, *Southern Railway* simply held ". . . that the imposition of special taxes upon foreign corporations for the *privilege* of doing business within the State is [not] sufficient to justify such different taxation." *Western & Southern*, *supra*, 451 U.S. at 662, quoting *Southern Railway*, *supra*, 216 U.S. at 417 (emphasis added). In *Southern Railway*, the purpose of promoting the domestic railroad industry might not have justified the tax, even if such a purpose had been asserted (which it was not, since the tax was a mere "privilege" tax or a condition of entry into the state), because Congress had not exempted the railroad industry from the restrictions of the Commerce Clause. Because the means of promoting a domestic railroad industry through differential taxation of foreign and domestic railroads would have offended the Commerce Clause,[9] such a purpose would plainly have been illegitimate, and the statute would thus have offended the Equal Protection Clause as well.

It is evident that statutes, the purposes of which offend independent Constitutional provisions (such as the Commerce Clause), cannot be deemed "legitimate" for purposes of equal protection analysis. *Cf., In re Griffiths*, 413 U.S. 717, 721 n.8 (1973) (state purpose must be constitutionally permissible). That is at least one reason why no discussion of the legitimacy of the state purpose to promote domestic industry is found in *Southern Railway*, *supra*; or in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) (invalidating an ad valorem tax on certain accounts receivable of non-resident corporations); or in *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968) (invalidating an ad valorem tax on certain property owned by foreign non-profit corporations); or in *Berkshires Motors Corp. v. Flynt*, 256 U.S. 421 (1921) (invalidating a tax discriminating against non-resident manufacturing companies). In each of these cases, it would have been futile to try to justify the tax involved as rationally related to promoting domestic industry through differential taxation; such a state effort would clearly have been illegitimate in light of the Commerce Clause, and it thus would have also failed the first requirement of the equal protection rational basis test, that the state purpose be legitimate. Accordingly, because of Commerce Clause limitations, the states were unable to shield the statutes from invalidation under the first prong of the equal protection analysis articulated in *Western & Southern*.

In the present case, of course, as in *Western & Southern*, the Commerce Clause does not come into play at all; by the express mandate of Congress, it is unavailable to render illegitimate a state's means of promoting its domestic insurance industry through differential taxation of domestic and out-of-state insurers.[10] And where the Commerce

[9] *See e.g., Bacchus Imports, Ltd. v. Dias*, *supra*: "[N]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" ____ U.S. ____, 104 S. Ct. at 3054, 82 L.W. 4878, 4881 (1984), quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959).

[10] As the present case and in *Western & Southern*, the Commerce Clause is rendered inapplicable by the McCarran-Ferguson Act, as *Allied Stores*, as appellants point out, Brief of Appellants at 31, n.15, the statute in

Clause is inapplicable, or is not offended, *see, Allied Stores of Ohio v. Bowers, supra*, this Court's decisions make clear that promotion of domestic industry and the pursuit of the benefits attendant to its growth and development through differential taxation are legitimate state efforts sufficient to sustain the challenged statute. *See e.g., Western & Southern, supra; Allied Stores of Ohio v. Bowers, supra.*

Thus, *Southern Railway v. Greene* and its progeny are inapposite where, as here, no Commerce Clause concerns are present to limit the legitimacy of a state's means of promoting beneficial domestic enterprises.[29] The *Southern Railway* Court's reliance on Commerce Clause cases, as emphasized in footnote 14 of the *Western & Southern* opinion, underscores this fact.

The cases relied upon by appellants are also inapplicable on their own terms. For example, appellants rely heavily on *WHYY, Inc. v. Glassboro, supra.* In *WHYY*, the Supreme Court invalidated real and personal property taxes applied to foreign nonprofit corporations but not levied on

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*question did not impermissibly burden commerce. It is a telling point that in these cases, where the Commerce Clause is irrelevant or is otherwise not offended, the tax statutes which differentiated on the basis of residence withstood equal protection scrutiny.*

[29]*Cf., Prudential Insurance Co. v. Benjamin, supra*, 328 U.S. at 430-31; ". . . Congress had no purpose to validate unconstitutional provisions of state laws, except insofar as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own action or by consenting to such laws. . . ." (emphasis added). Clearly, Congress has the constitutional power to authorize state purposes which would, in the absence of such authorization, be illegitimate under the Commerce Clause. That is precisely what the McCarran-Ferguson Act accomplished. *See Prudential Insurance Co. v. Benjamin, supra*, 328 U.S. at 431 (noting that the Act was "necessarily a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place an interstate insurance business a burden which it is sensible generally to bear or should not bear in the competition with local business," and therefore Congress "in effect declared that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance. . . .").



domestic corporations. Material to the Court's holding, however, was that the untaxed domestic corporations did not confer benefits upon the state which were not also conferred by the out-of-state corporations. 393 U.S. at 120. In stark contrast to *WHYY*, the case at bar is a case in which the foreign/domestic distinction is based on ". . . the foreign corporation's failure or inability to benefit the State in the same measure as do domestic [insurance] corporations." *Id.*[30] Indeed, the evidence on that point was extensive, and appellants have effectively, if not expressly, conceded that domestic insurance corporations provide distinct benefits to the State. Brief of Appellants at 31 (". . . this purpose [encouraging insurance companies to locate in Alabama] is essentially only a step in achieving the larger set of purposes suggested by the appellees, such as benefitting the local economy and bettering the welfare of the citizens of Alabama.").

The distinct benefits the State derives from domestic insurance companies are numerous and varied.[31] To begin with, the headquarters of those insurers seeking the lowest tax rate must be situated within the State, thereby contributing added jobs and payrolls, a much-needed contribution to a capital-poor state such as Alabama. Thompson Study, J.A. at 71, 76-78. A strong, viable, domestic insurance in-

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[30]*In the event that appellants attempt to dispute the fact that domestic insurers provide special benefits to the State and are otherwise materially different from out-of-state insurance companies, it is too late for them to do so, they having waived and conceded the factual issues presented by this case, see text at 4-5, supra.* Moreover, they will at most only be able to place the matter into debate, and it is to be remembered that if the issue is at least debatable, the statute must be sustained under the Equal Protection Clause. *Minnesota v. Clover Leaf Creamery, supra*, 449 U.S. at 464.

[31]*In addition to the benefits the State derives from domestic but not foreign insurers discussed immediately infra in the text, other benefits conferred on the State uniquely by domestic insurers are discussed at 40-42, infra.*

dustry also places needed competitive pressure on the large, national insurance companies that have so dominated the insurance market in the past. *Id.*, J.A. at 78-79. This increased competition directly benefits Alabama insurance consumers in the form of more attractive rates and more levels and types of services. *Id.*, J.A. at 78-81.

Another unique benefit conferred by domestic insurers is their potential for understanding and responding to local needs and situations. The national companies represented by appellants often have neither the flexibility nor the inclination to adapt their services and policies to the distinctive needs of a limited market segment, especially since their entire operations are premised and dependent upon large economies of scale. Domestic companies, on the other hand, are better situated to perceive and respond to the needs of a particular community or market segment within their home states. Thompson Study, J.A. at 82-85.

Similarly, a lower premium tax for domestic companies is a means whereby a state with a significant rural populace (such as Alabama) can ensure that isolated market segments will have adequate access to the insurance industry. Although sparsely populated market segments may not prove attractive to large, high-volume foreign corporations, because of the relatively limited return derived from servicing such areas,[89] these rural "niches" may well attract domestic companies able to profit from more modest returns.[90]

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[89] As noted in the text, *supra* at 31, the large foreign corporations, by admission of their own report, operate upon economies of scale not obtainable through servicing sparsely populated rural areas. Cf., note 91, *infra*.

[90] The lower tax rate available to domestic insurers not only encourages the formation of such new local companies, but is also enhances the economic feasibility of serving low-populated rural areas. The Thompson Study confirms that the statute achieves in actual practice this laudable goal -- domestic Alabama insurers place far greater emphasis on serving rural areas than do their out-of-state counterparts. J.A. at 99-100. *See also* the study of George A. Overstreet, Jr., Ph. D., to the same effect J.A. at 174-75.



The obvious result to be expected from the increased competition and market penetration deriving from to the growth of the domestic insurance industry is greater access to and use of insurance by Alabama residents. The Thompson Study confirms that this expected result has been obtained in actual practice. J.A. at 90-91. Since the enactment of the premium tax statute, the level of insurance coverage in Alabama has grown at a significantly faster rate than it has for the nation as a whole. *Id.*; *see also* the affidavit of appellants' expert, Alfred E. Hoffander, Ph.D., stating that "Family life insurance has increased in Alabama at a faster rate than for the U.S. as a whole . . . ," J.A. at 229-30, and that ". . . Alabama has more industrial insurance in force than any other state." J.A. at 229. Thus, though it is not required to do so,[91] Alabama's premium tax statute works in practice, as well as in design and theory, in achieving legitimate and permissible state goals.

That a state may permissibly distinguish between domestic and out-of-state interests, through differential taxation, in those instances in which the domestic interests provide special benefits to the state, was confirmed by necessary implication in *WHTT, Inc. v. Glusboro*, *supra*, 398 U.S. at 120 (noting in invalidating the statute that the case did not present an instance in which foreign companies failed or were unable to benefit the state in the same measure as were

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[91] It is to be remembered, of course, that whether the statute works in fact is not a question properly in issue; rather, the relevant inquiry is whether the legislature could have reasonably believed that the statute would promote any legitimate state interests. *Western & Southern*, 451 U.S. at 672; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466. It is evident from the premium tax statute's effects that the Alabama legislature could have reasonably believed that domestic companies provided unique and beneficial services to the State, and appellants have conceded this point.

domestics). In *WHYY*, of course, New Jersey had denied the foreign corporation a tax exemption which it accorded other nonprofit corporations "... *solely* because of the appellant's foreign incorporation ...." 395 U.S. at 120 (emphasis supplied), and not because of any special benefit which domestic corporations conferred upon the state. As demonstrated *supra*, at 51-55, however, that is not the situation presented by the instant case, in which domestic companies provide unique benefits to the State. Thus, far from supporting the proposition that Alabama's statute is somehow invalid, as appellants would have the Court believe, *WHYY* strongly suggests that a statute such as Alabama's, which makes classifications based upon rational differences and distinctions, is indeed constitutional.

The other cases cited by appellants as comprising their "unbroken line of precedents" suffer similar limitations. In *Wheeling Steel Corp. v. Glander*, *supra*, for example, the Court invalidated an Ohio *ad valorem* tax on certain accounts receivable of nonresident corporations where no similar tax was applied to identical receivables of domestic companies. The Court, however, did not hold such taxes invalid *per se*, nor did the Court even discuss the legitimacy of the state purposes related to the promotion of domestic industry. Indeed, such purposes appear not to have even been considered. Rather, the holding in *Wheeling Steel* was a very limited one, as the Court later pointed out in *Allied Stores of Ohio v. Bowers*:

> Appellant heavily relies on *Wheeling Steel Corp. v. Glander*. . . . We think that case is not apposite. There, Ohio statutes exempted from taxation certain accounts receivable owned by residents of the State but taxed those owned by non-residents. The statutes, on their face admittedly discriminatory against non-residents, themselves declared their purpose. That purpose was to confer to other States a scheme of "reciprocity" for taxing accounts receivable. Ohio argued that the reciprocal character of its statutes eliminated the discriminatory effects against non-residents, but this Court held that it did not.



*Allied Stores of Ohio*, *supra*, 358 U.S. at 529-30. Thus, the only purpose rejected by the Court in *Wheeling Steel* was the purpose of proffering to other states a "scheme of reciprocity" for taxing accounts receivable. That is not the purpose in issue here. Here, as in *Allied Stores*: "[T]he discrimination against residents is not invidious nor palpably arbitrary because, as shown, it rests not upon the 'different residence of the owner,' but upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy, which the State is not prohibited from separately classifying for purposes of taxation, by the Equal Protection Clause of the Fourteenth Amendment." 358 U.S. at 530 (sustaining tax levied on residents but not nonresidents on the basis that it encouraged the location of beneficent enterprises within the state). Therefore, *Wheeling Steel Corp. v. Glander*, like *WHYY, Inc. v. Glanzburg*, is inapposite on its own terms.

A third case heavily relied upon by appellants is *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494 (1926). That case, however, merely held that a state cannot relieve itself of the obligation of granting equal protection of the laws to foreign insurance companies doing business there simply by characterizing the discriminatory tax as a "privilege tax" or a condition of entry. 272 U.S. at 510. The state apparently never sought to justify the tax as designed to promote any legitimate state purposes. No discussion of such purposes is mentioned anywhere in the Court's opinion. The Court merely held that there was a discrimination in fact and that the State could not justify the discrimination by

discriminating in as a "privilege tax" or as a condition of entry into the State. 272 U.S. at 316. Thus, in no sense did *Hanover Fire* resolve the issues presently before this Court.

Nor did *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), overrule the long line of Supreme Court decisions sustaining the legitimacy of a state's efforts to promote a beneficial domestic industry. That case summarily reversed and remanded the decision of the Ohio courts upholding an *ad valorem* tax on tangible personal property of foreign insurers where domestic insurers were not similarly taxed. It is, however, erroneous to maintain, as appellants do, that *Reserve Life* stands for the blanket proposition that differential taxation of foreign interests in order to promote domestic industry is *per se* illegitimate. The Court's summary disposition discloses no reasons for the reversal, but it is clear that it was not necessarily based on the decision that a state's efforts to promote the domestic insurance industry were illegitimate. Indeed, other grounds for the reversal seem much more likely.

The crux of the lower court's holding in *Reserve Life* was that, because a roughly equivalent tax was imposed on domestic companies, the tax in question was nondiscriminatory: "Under all the circumstances apparent in the record here, it cannot be considered that the imposition of an *ad valorem* tax on the tangible personal property of a foreign insurance company . . . is an improper or unlawful classification of taxpayers *or discriminatory either for or against the foreign company*." *Reserve Life Insurance Co. v. Bowers*, 196 N.E.2d 114, 117-18 (Ohio App. 1963) (emphasis supplied), *appeal dismissed*, 175 Ohio St. 468, 196 N.E.2d 87 (1964). Thus, the probable basis of this Court's summary reversal was that the tax was, in fact, discriminatory, contrary to the lower court's holding. This seems even more likely given the fact that the State's brief, set



forth in the Appendix to the Appellants' Jurisdictional Statement at 52a, is devoted overwhelmingly to the issue of whether or not the tax was discriminatory.

Further support for this interpretation is indicated by the fact that the Court in *Reserve Life* did not simply reverse the decisions below, but reversed and *remanded* the case. As the Court explained in a later case, where attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court. *Dandridge v. Williams*, *supra*, 397 U.S. at 475 n.6. In *Reserve Life*, of course, the lower court did not reach either the question of the legitimacy of the state's purposes or of the statute's rational relationship to such purposes, because it found that the tax was nondiscriminatory. *See* 196 N.E. 2d 114. That this Court chose to reverse on the question of discrimination, and remand for consideration of the possible justifications for the discrimination, is evident from the fact that the remand order cited *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949). *Wheeling Steel*, of course, rejected a similar claim by Ohio that a tax it imposed on foreign insurers was nondiscriminatory. *See Allied Stores of Ohio v. Bowers*, 358 U.S. at 529-30 (explaining the limits of the *Wheeling Steel* decision). If the Court had, as appellants contend, resolved all of the issues presented in *Reserve Life*, there would have been no need to remand, and certainly no need to remand in light of *Wheeling Steel*.

Clearly, then, the Court in *Reserve Life* did not decide, as appellants maintain, all the issues presented in that case.[20] It is therefore incorrect to assert that the Court in

[20] Even if *Reserve Life* could somehow be said to have deemed illegitimate a state's purpose to promote domestic industry, which would be contrary to this Court's subsequent rulings in *Western & Southern*, *supra*,

*Reserve Life* "must have considered, and rejected the argument that the statute by the State's purpose to encourage the location of insurance companies in Ohio." *See* Brief for Appellants at 36. Other more likely grounds for the Court's decision are apparent, including, specifically, the issue of whether the tax was discriminatory in fact.

We have thus shown that an unbroken line of this Court's decisions dating back to 1906[29] have held that a state's purposes to promote its domestic industries and to obtain the benefits that flow from their growth and development constitute legitimate state interests. Indeed, appel-

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*and Pike v. Bruce Church, supra*, this Court has made clear that its summary disposition of a case, particularly when the case involves constitutional issues, will be given little weight as precedent. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court disregarded *three* of its previous decisions in which it had summarily affirmed District Court judgments, notwithstanding the fact that the Eleventh Amendment contentions ultimately accepted in *Edelman* had also been urged as grounds for reversal in those prior cases, as well as a fourth prior decision in which the contentions had been made but were not discussed in the Court's opinion. Said the Court:

> *Shapiro v. Thompson*, 394 U.S. 618 (1969), is the only instance in which the Eleventh Amendment objection . . . was actually presented to this Court in a case which was orally argued. . . . This Court, while affirming the [judgment of the three-judge District Court], did not in its opinion refer to or substantively treat the Eleventh Amendment argument. Nor, of course, did the summary dispositions of the three District Court cases contain any substantive discussion of this or any other issues raised by the parties. . . . This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. *Shapiro v. Thompson and these three summary affirmances obviously . . . are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law.*

415 U.S. at 670-71 (emphasis supplied) (footnote omitted). Appellants try to distinguish *Edelman* by pointing out that it involved summary affirmances while *Reserve Life* involved a summary reversal. However, in light of the Court's reasoning in *Edelman*, that plainly is a distinction without a difference.

[29] *See Board of Education v. Illinois, supra.*



lants have pointed to no decision in which such a purpose has been declared illegitimate for purposes of equal protection analysis, and that is a telling point. Numerous decisions of this Court have held that promotion of a beneficial domestic industry is a legitimate state purpose, and none has held such a purpose to be illegitimate when measured by the standards of the Equal Protection Clause alone. Particularly in light of Congress' implicit approval of differential premium taxes in passing the McCarran-Ferguson Act, *see, Prudential Insurance Co. v. Benjamin, supra*, 328 U.S. at 431 n.40, and in light of the long reliance of at least 32 states in enacting differential taxes on foreign and domestic insurers, this case presents no compelling reason to depart from this Court's unbroken line of authority. Alabama's differential premium tax is indeed supported by the legitimate state purposes attendant upon the promotion of its domestic insurance industry, and the decision of the courts below should be affirmed.

## II. The Alabama Statute's Investment Incentive Feature Promotes And Serves Legitimate State Purposes Properly Sustained Below.

### A. *The Alabama Premium Tax Statute's Investment Incentive Serves Legitimate State Interests and Draws Distinctions Based on Rational Differences Between Domestic and Nondomestic Insurance Companies.*

Alabama's premium tax statute provides a means whereby "foreign" but not "domestic" insurance companies may reduce their tax liability to the State by making investments within Alabama. Ala. Code § 27-4-4 (1975). The obvious purpose of this tax reduction incentive is, on its face, to encourage out-of-state companies to invest money in qualifying Alabama assets and securities. This facet of

the statute serves several very valid and legitimate state purposes.[37]

First, Alabama is a capital-poor state. Thompson Study, J.A. at 104-05. Therefore, by encouraging out-of-state insurance companies to invest assets within the State, Alabama seeks to slow the drain of premium dollars from within its borders and also to promote the influx of investment dollars from elsewhere, fostering both growth and stability in the State's economy. It is beyond argument that these are legitimate purposes. Indeed, this Court has expressly recognized, in the context of the Equal Protection Clause, the legitimacy of a state's efforts to preserve its finite resources, *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 390 (1978), as well as to promote its own economy. *Western & Southern*, *supra*, 451 U.S. at 671 and cases cited therein.

In addition to the fact that encouraging out-of-state insurers to invest in Alabama promotes growth and stability in the State's economy, it also operates to protect the insureds of the State. Domestic insurance companies, as defined under the statute, are not only required to maintain their complete books and records within the State, but they are required to maintain all of their assets, subject to certain clearly defined exceptions,[38] within the State as well. Ala. Code § 27-27-29 (1975). There is no similar requirement imposed on out-of-state insurers. The effects of this requirement are readily apparent.

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[37]*See, e.g.*, Note, *Taxing Out-of-State Corporations After Western & Southern: An Equal Protection Analysis*, 33 Stan. L. Rev. 877, 888 (1982) (noting that the purpose to promote investment is legitimate because it promotes full employment, stable prices, and economic growth).

[38]These exceptions are limited to (1) real property located outside Alabama and the personal property appurtenant thereto, and (2) such property as is necessary to conduct business from "regional home offices" outside Alabama. Ala. Code § 27-27-29 (b) (1) (1975). (Printed in the appendix to the State's Motion to Dismiss or Affirm at 18a-19a).



First, by virtue of the facts that all of their books and assets are located within the State, and that they are subject to the Alabama corporation laws, domestic insurers are more easily policed and regulated than are out-of-state insurers.[39] Thus, the Department of Insurance is better able to protect citizens insured by domestic companies, as opposed to those insured by out-of-state companies, from the hazards of insurance fraud, mismanagement of funds, unfair settlement practices, company failure, and the like. Not only is the Department better able to detect, and perhaps prevent, these occurrences with respect to domestic companies, but, when it does detect them, it is better situated to seize or freeze the assets of the domestic company since such assets are largely within the State. By this or other appropriate action, the State is in a better position to protect the interests of Alabama insureds.

It is more difficult for the Department to provide similar protections with respect to citizens insured by out-of-state companies, or with respect to Alabama taxpayers.[40]

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[39]*Accord, Board of Education v. Illinois*, 203 U.S. 553, 562 (1906). Cf., John Dunne, "Risk, Reality and Reason in Financial Services Deregulation: A State Legislative Perspective," 1 *Journal of Insurance Regulation*, 342, 365-70 (1983) (noting the practical difficulties the states encounter in regulating the business of insurance).

[40]Should a foreign insurer doing business in Alabama, but domiciled in a state without guaranty association laws covering Alabama citizens, become insolvent, all insurers licensed to do business in Alabama in the line of insurance (life, or property and casualty) in which the insolvent company was doing business are assessed in an amount such that any deficiency is "covered." Ala. Code §§ 27-42-16, 27-44-13 (1975). The companies so assessed pass this cost along to the citizens of Alabama through a tax credit which they receive pursuant to Ala. Code § 27-3-11 (1975).

With respect to out-of-state insurers, which, unlike domestic insurers, are not required to maintain their assets in Alabama, the State's exposure in the event of insolvency is greater since the deficiency with respect to an out-of-state insurer is apt to be greater than it would be a domestic insurer. Since the deficiency is passed on to the citizens of Alabama through the statutory tax credit, Alabama taxpayers are at greater risk

however, unless such companies have substantial assets in the State. In reality, since domestic companies are more easily policed than out-of-state companies, it is even more important that the latter maintain assets within the reach of the State. The tax reduction incentive encourages such companies to invest assets in the State, thereby providing much-needed protection[40] for Alabama insureds while also stimulating the growth and stability of the State's economy.

It is readily apparent that the investment incentive provision of the premium tax statute serves several legitimate and permissible state purposes. It discourages the drain of premium dollars, paid by Alabama citizens, from the State. It promotes growth and stability in the Alabama economy. And it protects Alabama insureds from such dangers as insurance fraud, mismanagement of funds, company failure, and similar hazards. Since the statute is rationally related[41] to the promotion of these and other legitimate purposes, the courts below correctly sustained its validity.

### B. *Appellants' Attempted Rebuttal of the Legitimacy of the Investment Incentive is Without Merit.*

Recognizing that the existence of legitimate purposes is

with respect to foreign as opposed to domestic insurers in the event of the insolvency of an insurer doing business in the State.

[40]This is very important in the context of insurance, since insurance, by its very nature, is designed to provide security and protection to purchasers. Moreover, Congress expressly delegated the responsibility of policing this important industry to the states and when it enacted the McCarran-Ferguson Act, and it thereby charged each state with the duty of protecting its own citizens who purchase insurance. *See, e.g.*, H.R. Rep. No. 143, 78th Cong., 1st Sess. 2 (1945). Alabama's premium tax investment incentive is one means of discharging that duty.

[41]It needs to be reiterated that appellants waived their right to a trial on the rational relationship prong of the Western & Southern equal protection test, thereby having to dispute solely the legitimacy of the statute's purposes, the first prong of the Western & Southern inquiry. If the Court deems, as we submit it should, that any of the purposes are legitimate, it need not reach or resolve any other issues.



fatal to their case, appellants attempt to rebut the obvious legitimacy of the investment incentive by (1) alleging that the investment incentive is illegitimate because foreign companies are never able to reduce their tax rate to that applied to domestic companies, and (2) alleging that the investment incentive is improvident and unworkable. (Brief of Appellants at 27-29). Such contentions are not well taken.

That appellants are never able, through the investment incentive alone, to reduce their tax rate to that applied to domestic companies is true; however, several legitimate and rational distinctions justify this difference. In order to qualify as a "domestic" company for tax purposes, an insurer must both be incorporated within the state and must also maintain its principal place of business in Alabama.[42] Domestically incorporated companies are more easily policed and regulated than their out-of-state counterparts, *see* n.39, *supra*, and accompanying text, and, since the policing of the insurance industry is fundamentally the province and responsibility of the states,[43] the fact that out-of-state and domestic companies are taxed different[ly], is a distinction based upon legitimate state interests. In addition to the fact that a domestic company must be incorporated in Alabama, it must also maintain its principal place of business within the State if it is to receive the lowest tax rate. This requirement, too, is related to a legitimate state purpose -- the promotion of full domestic employment.

In essence, Alabama's statute requires companies desiring the lowest possible tax rate (1) to incorporate in Ala-

[42]In addition, as noted *supra*, at 40, a domestic company must maintain all of its books and records, and substantially all of its assets, in Alabama. Ala. Code § 27-27-29 (1975), and based on such facts, the State is able to confer special protections and benefits on its citizens insured by such a company.

[43]*See* note 40, *supra*.

bama, thereby facilitating the greatest degree of control and regulation with the attendant benefits to Alabama citizens, and (2) to place their principal places of business within the State, so as to further these goals and to promote full and stable employment. Companies not willing to make both of these "investments" in Alabama are, nevertheless, still permitted to reduce their tax liability by investing assets within the State, thereby conferring other benefits on the State. To argue, however, as appellants do, that the investment incentive is illegitimate because they are unable, pursuant solely to such program, to achieve the lowest possible tax rate, is without merit. It is both readily apparent and legally sufficient that the difference in the tax rate is dependent upon distinctions rationally related to legitimate state interests.

Appellants' argument that the investment incentive is improvident and unworkable is likewise without merit. In the first place, this argument is a subtle effort to resurrect the second prong of the rational basis test articulated in *Western & Southern*. Appellants, in the courts below, waived their rights to a trial on that issue and conceded that it must be resolved in favor of the State. They should not now be permitted to renege on that concession. Additionally, whether or not the statute works is a question not properly in issue, *Western & Southern, supra*, 451 U.S. at 672, and the argument that the investment incentive may be unworkable in practice is mere rhetoric without substance.[45]

[45]Interestingly, William J. Howard, Associate General Counsel of appellant Metropolitan Life, is on record stating that his company does not consider the investment incentive in structuring its investment decisions. J.A. at 192. This shows that these insurance giants are in truth asking this Court to validate their choice of investment decisions and to permit them to ignore the regulatory efforts of capital-poor states such as Alabama, in contravention of Congress' intention in enacting the McCarran-Ferguson Act.



Finally, appellants cite *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921), for the proposition that differential tax schemes which permit out-of-state interests to reduce their otherwise higher tax liability inherently violate the Equal Protection Clause. *Bethlehem Motors*, however, does not stand for that proposition. Indeed, material to the Court's decision striking down the North Carolina law in question was the concession by both the North Carolina Supreme Court and the North Carolina attorney general that the investment incentive provision of their statute was irrational and unworkable. *Id.* at 425. This Court would have had no need to reach this second prong of the rational basis test if, as appellants now argue, differential tax statutes were *per se* illegal under the Equal Protection Clause.[46] Yet, the Court did review the statute under the rational basis test, satisfied itself that encouraging investment constitutes a legitimate state purpose, and then apparently invalidated the statute because it was not rationally related to the proffered purpose.

Unlike the statute in *Bethlehem Motors*, it can hardly be argued that Alabama's incentive is irrational. As the appellants' own study indicates, in 1979 alone out-of-state insurance companies realized a tax savings of about $8.4 million pursuant to the investment incentive.[47] J.A. at 306. Contrary to appellants' exaggerated view of the incentive, a more reasonable interpretation of the feature is that the incentive exists, it is rationally structured, and a meaning-

[46]It is axiomatic that the Court does not reach or decide issues not necessary to its decision. *See, Barker Painting Co. v. Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America*, 281 U.S. 462 (1930).

[47]By stark contrast, the out-of-state companies in *Bethlehem Motors* apparently received no tax savings whatsoever, and hence it was unreasonable there to believe that the North Carolina statute would promote investment within the state.

ful number of out-of-state insurers have taken advantage of its provisions. It is legally sufficient that the incentive was deliberately created, firms have voluntarily chosen to utilize it, and the Alabama economy has benefitted from the added investments produced by the incentives. J.A. at 109-11.[48]

## III. The McCarran-Ferguson Act Requires That The Judgment Of The Courts Below Be Affirmed.

Finally, the judgment from which this appeal has been taken is due to be affirmed because of the mandate of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982). The legislative history of the Act confirms that Congress determined that the business of insurance is ". . . a local matter, to be subject to and regulated by the laws of the several states. . . ." H.R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945). This Court confirmed that intent in *Prudential Insurance Co. v. Benjamin, supra,* 328 U.S. at 431, when it held that Congress, in enacting McCarran-Ferguson, ". . . intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance. . . ." Thus, as even appellants concede, Congress determined ". . . that regulation and taxation of insurance companies *by the states* was in the public interest . . . ," Hofflander Affidavit, J.A. at 224 (emphasis supplied). Congress therefore declared that the public interest was best served by not re-

[48]In addition to the fact that the statute has promoted the State's economy, it has also apparently caused some foreign companies to incorporate and to locate their principal headquarters within the State. (*See* statement of Joseph Lieberman, Esquire, Attorney General of the State of Connecticut, and counsel on brief *amicus curiae* in support of appellants filed by the states of Connecticut, Massachusetts, New Hampshire and Rhode Island, reported in an Associated Press news release in *The Birmingham News*, June 25, 1984 at 2-A, col. 1 (last paragraph of article) and set forth in the Appendix to this Brief at 1a.)



quiring uniformity of regulation and taxation of the business of insurance by the several states.

Despite the clear Congressional mandate of McCarran-Ferguson, it is clear that this litigation represents an effort by a narrow band of thirty-nine self-described national insurers to obtain precisely what Congress declared to be both unnecessary and undesirable — national uniformity in the regulation and taxation of the business of insurance in the several states. This fact is readily apparent from the prepared testimony of appellants' expert, Alfred E. Hofflander, Ph.D.:

> The business of insurance[49] is nationwide. . . . [T]he industry conducts extensive components of its business across state lines. The existence of state borders *per se* does not hinder the conduct of a healthy and viable insurance industry nor interfere with the workings of a competitive industry.
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> • • •
>
> Although most of the business of insurance is conducted across state borders, the regulation of insurance has been the domain of the states. Thus the majority of companies find themselves subject to the regulation of several states, many to the regulation of each of the fifty states. The National Association of Insurance

[49]"The business of insurance," as used by Dr. Hofflander, should in reality read "The business of my clients, the thirty-nine appellants." Dr. Hofflander's description of the business of insurance as "nationwide" completely ignores the existence of companies such as the Booker T. Washington Insurance Company, which writes one hundred percent (100%) of its insurance policies within Alabama. *See* Exhibit 16 to the Hofflander Affidavit, Column 1, J.A. at 253. Apparently, to Dr. Hofflander, the "business of insurance" does not include a large number of participants in the market as a whole. Moreover, Dr. Hofflander's declaration that the business of insurance is "nationwide" is in direct conflict with Congress' finding that the business of insurance is ". . . a local matter, to be subject to and regulated by the laws of the several states. . . ." H.R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945). Appellants, through Dr. Hofflander, are in truth asking the Court to second-guess the wisdom of Congress.

> Commissioners (NAIC) has recognized the potential burden of regulation by 50 distinct regulatory authorities. A goal of the NAIC has been to provide a great deal of uniformity in regulation in order to minimize the burden on insurance companies operating in several states. The major exception to this striving for uniformity across states, and thus the promotion of the interstate business of insurance companies, has been in the area of state taxation of insurance companies.

J.A. at 234-35. It is obvious that appellants view the area of state taxation of insurance companies as the last remaining obstacle in the path of what they most desire -- national as opposed to state-by-state regulation of their industry -- and they are seeking to remove that obstacle, in pursuit of their own narrow economic goals, through this litigation.

In essence, appellants are asking the Court to ratify their business and investment practices which openly and brazenly ignore the regulatory efforts of states such as Alabama. *See, e.g.*, Affidavit of William J. Howard, Associate General Counsel of Metropolitan Life Insurance Company ("... [T]he Company does not consider the so-called Alabama investment incentive provision when making investment decisions."), J.A. at 192, and Affidavit of David H. Fredericks, Secretary of Prudential Property and Casualty Insurance Company "... [I]t can be said with certainty that the investment incentive which is a part of the Alabama taxing provision has had no impact or influence on this Company's investment decisions."), J.A. at 198. Thus, because it suits their own narrow economic interests, appellants have chosen to ignore salient and important aspects of the Alabama statute, and they are in truth asking this Court to validate that choice.

The State respectfully submits that the McCarran-Ferguson Act's declaration "... that uniformity of regulation,



and of state taxation, are not required in reference to the business of insurance ...," *Prudential Insurance Co. v. Benjamin, supra*, 328 U.S. at 431, teaches that appellants may continue their deliberate choice to ignore state borders and sovereignty, but they must pay the price which Alabama and 31 other states impose for that choice. Uniformity among the several states is not required -- indeed, Congress has determined it to be contrary to the public interest.

By virtue of McCarran-Ferguson, the field of insurance is one of the few remaining areas in which the states have been left free to operate as laboratories, to make regulatory choices unfettered by the restraints of the Commerce Clause, and to promote the welfare of their citizens without regard to the fact that to a narrow group of some thirty-nine insurance companies, the appellants herein, the business of insurance may be nationwide. This freedom is the result of Congress' deliberate and informed choice, and that choice should not be disturbed merely because appellants perceive that it somehow does not best serve their own particular economic or business interests, where, as here, the State has shown both economic and social justifications for making a contrary choice.

## CONCLUSION

The judgment of the courts below, sustaining the validity of the Alabama statute, should be affirmed because appellants have not met their burden of negativing every conceivable legitimate state purpose supporting the statute. The judgment of the courts below is also due to be sustained because of the Congressional mandate in the McCarran-Ferguson Act.

Respectfully submitted,

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# APPENDIX

# CONNECTICUT JOINS SUIT TO STOP HIGHER INSURANCE TAX

HARTFORD, Conn. (AP) – Connecticut is joining a lawsuit aimed at stopping Alabama from taxing out-of-state insurance companies at higher rates than those based in Alabama, state Attorney General Joseph Lieberman said Friday.

Connecticut and three other states are filing friend-of-the court briefs in the suit, which was brought against Alabama by the New York-based Metropolitan Life Insurance Co. and is before the U.S. Supreme Court on appeal from the Alabama Supreme Court.

Lieberman told a news conference that the Alabama law "means that Connecticut (insurance) companies are forced to charge a higher price to consumers in Alabama because they're passing the tax along."

Alabama, he said, "simply doesn't have the right to charge more to out-of-state companies than in-state companies."

Lieberman said the effect of the Alabama law has been to force some insurance companies to open offices in Alabama so they could qualify for the lower tax rates.

# AMICUS CURIAE

# BRIEF

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No. 83-1274

# In the Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN LIFE INSURANCE COMPANY, et. al.,

Appellants,

v.

W.J. WARD, JR., et. al.,

Appellees.

On Appeal from the Supreme Court of Alabama

## Brief of the States of Alaska, Arizona, Colorado, Florida, Hawaii, Kansas, Kentucky, Michigan, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, Ohio, South Carolina, South Dakota, Texas, Washington, and Wyoming In Support of Appellees, Amici Curiae

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## INTERESTS OF AMICI CURIAE

*Amici* states presently employ or formerly used domestic preference methods of varying degrees in taxing insurance companies doing business within their borders. Some *amici* apply rate differentials between domestic and foreign insurers; others use different tax bases for domestic and foreign companies. Thirty-two of this nation's states currently apply domestic preference tax systems to corporations engaged in the insurance business.

Appellant foreign insurers' challenge to Alabama's domestic preference tax law necessarily questions the validity of the domestic preference tax systems of *amici* and other states. Those systems promote substantial benefits that accrue to a state with a viable domestic insurance industry. A proper and principled resolution of the equal protection claim presented by appellants in this case will enhance the ability of *amici* states to surmount similar challenges to their own taxing systems.

*Amici* have a significant and immediate stake in the resolution of this Alabama litigation. At the time of filing of this brief, foreign insurers have filed claims seeking refunds of hundreds of millions of dollars in similar litigation in *amici* states. The fiscal effect of an adverse decision in this case would be financially catastrophic for *amici* and other domestic preference states.

*Amici*'s interest in the outcome of this litigation, however, is not merely a fiscal concern. Because this case concerns state taxation of insurance companies, it has important implica-

tions for state-federal relations. All *amici* states have a substantial interest in the vitality and competitiveness of their domestic insurers. *Amici* have relied upon this Court's consistent interpretation of the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011-1015 (1976)), as removing Commerce Clause values from the appropriate standard of review of state regulation and taxation of the insurance industry. *Amici* support preservation of the Commerce Clause policy set forth in this area by the Congress and they support preservation of state prerogatives with respect to insurance regulation and taxation. The *amici* states listed in the appendix to this brief therefore appear with the State of Alabama to urge recognition of the validity of the state insurance taxing scheme now under review.

## SUMMARY OF ARGUMENT

A proper and principled interpretation of the Equal Protection Clause of the Fourteenth Amendment compels validation of a state taxing scheme which accords in-state insurance companies a preference over out-of-state insurers. A state insurance tax law that favors domestic insurance companies over foreign insurers in order to promote the business of domestic insurers does not deny equal protection of the laws. The Equal Protection Clause does not require a state to provide identical treatment of domestic and foreign insurance companies. Only the analytically erroneous interjection of Commerce Clause doctrines would mislead one to conclude



that domestic preference insurance taxation violates the federal constitution.

Commerce Clause values have no proper place in the constitutional analysis of this case. Congress affirmatively removed any constraints of the Commerce Clause on preferential taxation of domestic insurance companies when it passed the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011-1015 (1976)). The evident policy of this Commerce Clause legislation, pertinent to analysis under the Fourteenth Amendment, is that because the insurance business is particularly a matter of local concern, state regulation of the insurance industry best serves the public interest. Given the historical setting in which this policy was announced, Congress thus determined that local favoritism in state taxation of insurers was not a concern of constitutional dimension.

In light of this fact and because the Equal Protection Clause analysis does not encompass Commerce Clause values *sub silentio*, domestic preference taxation of insurance companies may serve a legitimate state purpose. To transmute the commercial concerns underlying the Commerce Clause into the analysis of the wholly different personal rights embodied in the Equal Protection guarantee muddles constitutional analysis of congressional prerogatives and of state taxation powers.

This Court recently declined to hold that the Equal Protection Clause requires equal tax treatment of foreign and

domestic insurance companies. In *Western & Southern L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 667-68 (1981) [hereinafter *Western & Southern*], the Court upheld a state's imposition of retaliatory taxes on foreign insurers under a broader equal protection standard. That standard would validate discrimination bearing a rational relationship to a legitimate state purpose. The domestic preference insurance tax at issue here passes the *Western & Southern* test.

Appellants, however, wrongly assert that precedents prior to *Western & Southern* require states to extend foreign insurers tax treatment equal to that levied on domestic insurers or, at the very least, compel the conclusion that preferential taxation of domestic insurers has no legitimate state purpose. The decisions relied upon are variously distinguishable for three categories of considerations. Some involved foreign corporations that simply were not engaged in the insurance business. Others turned on Commerce Clause values, which are inapposite because of the McCarran-Ferguson Act. Still others were decided on the ground that no difference in the state's relation to foreign as opposed to domestic corporations could serve as a meaningful basis of distinction for property tax purposes. But ultimately, the precedents in which appellants place so much stock are not compelling. They state a more restrictive equal protection standard than the authoritative test of *Western & Southern*, and the legitimacy of the states' purposes in imposing domestic preference taxes on insurance companies readily can be discerned.



Resolution of the equal protection issue in this case turns on whether the state conceivably has a legitimate purpose in preferential taxation of domestic insurance companies. This Court's decisions consistently confirm great leeway to state legislatures in making such a determination in the first instance, and establish that promotion of local industry suffices as a legitimate concern. Moreover, manifest differences in the relation of foreign and domestic insurance companies to state interests in the insurance business justify and legitimize a legislative purpose to promote a local insurance industry.

Preferential state taxation of domestic insurance companies reasonably can be viewed as a policy that encourages the formation and continued operation of local companies. A viable domestic industry in turn serves the state's interest in promoting its economy and its interest in seeing that particular and perhaps unique insurance needs of its citizens are satisfied. A domestic insurance company, rather than a foreign insurer, more likely will provide maximum contribution to the state's economy by providing an increase in employment and payrolls, by stimulating growth in related service industries, by enhancing the availability of capital for local investment, and by maintaining an industry that is more stable than most in troubled economic times.

Additionally, a viable domestic insurance industry conceivably may better serve particular local insurance needs because domestic companies are less likely than foreign insurers to withdraw from the state when local business, social, or

legal developments make certain local risks less attractive to insure. Domestic insurers similarly are more likely to serve less desirable geographic markets within a state. Moreover, because domestic insurance companies are more susceptible to state regulation, state consumers of domestic insurance can be afforded greater protection. In short, state economic and public welfare interests are served by a thriving domestic insurance industry.

State promotion of its domestic insurance industry is, therefore, a legitimate state purpose. Appellants do not contend that a domestic preference tax is not rationally related to achievement of this purpose. Under an equal protection analysis that properly is stripped of inapplicable Commerce Clause concerns, the decision of the Alabama appellate court upholding the state's preferential taxation system should be affirmed.

## ARGUMENT

Under appropriate equal protection analysis, preferential state taxation of domestic insurance companies is lawful. *Amici* states appear in support of appellees to forestall the attempt of appellant insurance companies to adulterate and confuse the constitutional analysis that otherwise would sustain the state tax legislation challenged here. Contrary to appellants' contention, the Equal Protection Clause of the Fourteenth Amendment does not invalidate a state law that imposes a greater tax on premiums paid to out-of-state insurance companies than on premiums obtained by the state's domestic insurers.



This Court has recognized that a state legitimately may use its tax laws to promote the business of its domestic insurance companies. *Western & Southern*, 451 U.S. at 671. In a domestic preference tax program, the distinction between domestic and foreign insurers is based upon identifiable differences in the relevant characteristics of foreign and domestic insurance companies that are subject to the tax. Unless other constitutional values erroneously are brought into play, Alabama's system of preferential taxation on premiums paid to its domestic insurers withstands an equal protection challenge.

### I. State insurance tax programs, such as Alabama's, which use a domestic preference differential should be sustained under an equal protection analysis that properly does not incorporate inapposite Commerce Clause principles.

The Equal Protection Clause does not require Alabama to tax foreign and domestic insurers identically. As recently as the 1980 Term, this Court declined to hold that the Equal Protection Clause required states to afford domestic and foreign insurers equal tax treatment. *Western & Southern*, 451 U.S. at 656-57, 668. Appellants, nevertheless, advocate a rule of equality as the standard for measuring state differentials in insurance taxation. Their equal protection argument should be rejected because it is based on inapplicable constitutional values.

Appellants must recognize, in light of *Western & Southern*, 451 U.S. at 656, that as corporations they cannot mount a

claim under the Fourteenth Amendment Privileges and Immunities Clause. They nevertheless invite this Court to employ a "standard announced in the analogous context of the Privileges and Immunities Clause." (App. Br. 28 n.22). Even more telling is appellants' attempt to introduce Commerce Clause considerations into this Court's equal protection analysis. This misguided sally should be rebuffed. Constitutional law has been settled clearly in the area of preferential state taxation of domestic insurance companies.

The textual source of a constitutional rule repudiating local favoritism in a state's insurance tax program is the Commerce Clause, not the Equal Protection Clause. It is the Commerce Clause that prohibits state taxation which favors local business and thereby discriminates against interstate commerce. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). But Congress has resolved any potential conflict between the Commerce Clause and state domestic preference taxes on the insurance industry.

This Court unequivocally stated that "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 *et seq*. . . ." *Western & Southern*, 451 U.S. at 653. The Court acknowledged that the business of insurance was found by Congress to be a uniquely local concern and that, in light of its historical setting, the McCarran-Ferguson Act removed all Commerce Clause obstacles to discriminatory state taxation of foreign insurers. 451 U.S. at 654, 655. Congress thus



addressed the question whether state taxation that favors local insurance companies offends Commerce Clause values and concluded unequivocally that it did not. Because Commerce Clause values are not compromised, preferential state taxation of domestic insurers should be deemed to have a legitimate state purpose. For this reason, concern about local favoritism in state taxation of the insurance business should play no part, explicitly or *sub silentio*, in an Equal Protection Clause evaluation of state regulation of insurance companies.

In making this point, *amici* recognize that Congress, in passing the McCarran-Ferguson Act, did not purport to decide what would constitute equal protection of laws. *Western & Southern*, 451 U.S. at 655 n.6. The legislative findings and policy underlying the McCarran-Ferguson Act, however, have a significant bearing on appellants' equal protection claim. Congress could find, as it did, that the insurance business is essentially " 'a local matter, to be subject to and regulated by the laws of the several States,' H.R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945)." *Western & Southern*, 451 U.S. at 654. Congress could also declare, as it did, a policy ". . . that continued regulation and taxation by the several States of the business of insurance is in the public interest . . . ." *Western & Southern*, 451 U.S. at 653 (citing section 1 of the Act, 59 Stat 33, 15 U.S.C. § 1011).

In light of these factors and in the absence of any other countervailing constitutional text or principles, this Court should uphold Alabama's tax program. The proper conclusion to be drawn in conducting an equal protection analysis of the

preferential taxation program at issue here is that state favoritism of local industry in the taxation of the insurance business may serve a legitimate purpose. A contrary conclusion contradicts this Court's recognition that a majority of the Court has *not* adopted the view that the Equal Protection Clause is "an instrument of federalism," by which to "structure . . . the operation of the States with respect to the National Government and with respect to each other." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring). *Western & Southern*, 451 U.S. at 667 n.21. Such a view should not be adopted in this case. The Equal Protection Clause was designed to serve personal, rather than commercial, values. Its structure, purpose, and analysis are wholly different from those of the Commerce Clause, which was designed to encourage growth of a national economic market. Doctrines articulated under Commerce Clause construction for one and one-half centuries reconfirm the objective that Congress is to decide when any departures from this purpose can be allowed. It is a fundamental analytical mistake to superimpose the commercial supremacy doctrines of the Commerce Clause on the legal application of the Equal Protection Clause.

Appellants nevertheless attempt to garb Commerce Clause values in equal protection clothing. Having missed the significance of the McCarran-Ferguson Act, they fail to accord this Court's decision in *Western & Southern* proper regard. They chide the appellees for contending previously that *Western & Southern* adopted a different equal protection



standard, for application to state taxation of insurance companies, than the rule of equal treatment of foreign and domestic corporations announced in a previous line of cases. (App. Br. 16-17). The Court, however, departed from this line of cases and modified the prior rule. It analyzed an equal protection challenge to California's scheme of retaliatory taxation of foreign insurers under a standard which would validate a state's "imposition of more onerous taxes or other burdens on foreign corporations" if "the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." 451 U.S. at 668.

This ruling marked a "significant change" in equal protection analysis of discriminatory state taxation of foreign insurance companies and a departure from earlier cases that "were very much akin to the Commerce Clause's 'fundamental principle.'" 1 J. Hellerstein, *State Taxation* § 3.7[3][a], at 69 (1983). But appellants persist in seeking application of the "traditional test" to domestic preference taxes such as Alabama's. (App. Br. 16).

Appellants maintain that a long line of precedents requires invalidation of Alabama's tax differential. (App. Br. 12-20). Appellants are wrong. It is significant that none of the cases cited by appellants addressed the purposes and interests advanced by Alabama in support of its taxing statute. Moreover, each of these cases is factually and analytically distinguishable from the instant case.

*Southern Railway Co. v. Greene*, 216 U.S. 400 (1910), did not involve taxation of an insurance company. Although it

invalidated on equal protection grounds a tax imposed only upon foreign corporations, it relied, as this Court noted in *Western & Southern*, 451 U.S. at 622 n.14, on two Commerce Clause cases decided the same term.

*Hanover Ins. Co. v. Harding*, 272 U.S. 494 (1926), did involve a discriminatory tax imposed upon a foreign insurance company at a time when insurance was not considered to be commerce. Because the case followed and extended *Southern Railway Co. v. Greene*, *supra*, its precedential value, however, similarly is limited. It, too, necessarily was based upon the application of inapposite Commerce Clause values under the guise of an equal protection analysis.

*Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), are distinguishable because the Court drew upon Commerce Clause values, because the foreign corporations which successfully contested discriminatory *ad valorem* property taxes were not insurance companies, and because " 'the inequality [was] not because of the slightest difference in [the state's] relation to the decisive transaction, but solely because of the different residence of the owner.' " *WHYY v. Glassboro*, 393 U.S. at 120 (citing *Wheeling Steel*, 337 U.S. at 572). As discussed below, the distinction drawn in domestic preference tax legislation between domestic and foreign insurance companies is based upon differences in the ability of domestic and foreign insurers "to benefit the State in the same measure." *WHYY v. Glassboro*, 393 U.S. at 120.



*Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), the *per curiam* reversal that has stirred so much debate between the parties (App. Br. 34-36), apparently did sustain an insurance company's equal protection challenge to the imposition of a discriminatory personal property tax on foreign insurance companies. It was, however, a single line decision which merely cited *Wheeling Steel*. Whatever this Court's unpublished reason for disposing of the case in this manner, the case is of little precedential value, particularly because the Court had no occasion to address the point *amici curiae* make here: When Commerce Clause considerations appropriately are set aside, the Equal Protection Clause does not bar state discrimination against out-of-state insurers.

The state's brief in *Reserve Life* raised two points: 1) That state substitution of a franchise tax for a personal property tax as to domestic insurers merely created a permissible difference in the modes of taxation; and (2) That corporations were not "persons" protected by the Equal Protection Clause. To the extent that the state may have suggested that the purpose of the tax was to encourage the location of insurance companies in Ohio, that point was completely undercut by its primary argument that the tax burdens on foreign and domestic insurers were substantially equivalent. In any event, this Court need look back no further than its more recent decision in *Western & Southern* to conclude that domestic preference taxation of insurance companies complies with the mandate of the Equal Protection Clause.

Contrary to appellants' contentions, neither this Court's holding in *Western & Southern* nor proper constitutional analysis sustains their claim that Commerce Clause values are inherent in the equal protection guarantee. In their brief on the merits, appellants emphasize that the purpose of the retaliatory tax laws upheld in that case was to promote the interstate business of domestic insurance companies. (App. Br. 17). This emphasis ignores the implications of the McCarran-Ferguson Act and thus mischaracterizes the analytical basis for the Court's holding.

The statute at issue in *Western & Southern* imposed a retaliatory tax on foreign insurers. The principal purpose of retaliatory taxes is "to promote the interstate business of domestic insurers . . . ." *Western & Southern*, 451 U.S. at 668. Appellants would focus on the words, "interstate business," and graft Commerce Clause values onto equal protection analysis. In light of McCarran-Ferguson and the acknowledged limits of the Equal Protection Clause, *Western & Southern* should be read as focusing not on the interstate nature of the insurance industry but, rather, on the state's prerogative to protect the business of its domestic insurers. *Western & Southern*, 451 U.S. at 672.

In upholding the constitutionality of retaliatory taxes, this Court recognized the legitimacy of a state's interest in protecting its domestic insurance companies when they expand their business transactions outside the home state. Similarly, this Court should recognize the legitimacy of a state purpose to promote the business of its domestic insurers by means of



domestic preference taxation, where, as in this case, otherwise limiting Commerce Clause principles are inapplicable. Contrary to appellants' contention, the distinction between foreign and domestic insurance companies is based upon differences in their particular abilities to benefit the state.

**II. Differences between the abilities of foreign and domestic insurers to benefit a state justify the state's preferential tax treatment of domestic insurers.**

Purged of extraneous Commerce Clause concerns, proper equal protection inquiries are: (1) Whether the challenged domestic preference tax has a legitimate purpose; and (2) Whether a state legislature reasonably could have believed that the distinction between domestic and foreign insurers would promote that purpose. *Western & Southern*, 451 U.S. at 668. The issues in this case, however, have been narrowed because appellants have stipulated that the classification used by Alabama rationally may be believed to promote its underlying purposes. (J.S. App. 2a). Thus, the sole question in this case is whether Alabama has a legitimate state interest in taxing foreign insurers at a higher rate than domestic insurers.

Appellant foreign insurance companies mistakenly criticize Alabama for asserting that its preferential taxation of domestic insurance companies serves a legitimate state purpose in promoting the domestic insurance industry because domestic insurers benefit the state in ways foreign companies do not. (App. Br. 30-36, 31 n.25). Alabama's contention, however, is well taken because it establishes the state's com-

pliance with "the distinguishing principle [of the Equal Protection Clause] that classification must rest on differences pertinent to the subject in respect of which the classification is made." *Western & Southern*, 451 U.S. at 668 (quoting *Power Co. v. Saunders*, 274 U.S. 490, 494 (1927)). This distinction is not "rendered meaningless" (App. Br. 31 n.25) by recognition of the legitimacy of a state purpose of promoting domestic companies. As demonstrated below, the distinction between foreign and domestic insurance companies in domestic preference tax legislation is based upon identifiable differences in their ability to benefit the state.

Contrary to appellants' hypertechnical argument (App. Br. 32-34), a reviewing court which must evaluate the legitimacy of state purposes underlying a tax differential is not limited solely to those purposes and goals recited in the statutory language or legislative history. The standards of judicial review have been thoughtfully considered and carefully articulated. For decades of constitutional analysis, this Court has considered all conceivable purposes that might underlie the statute in question, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), *Schilb v. Kuebel*, 404 U.S. 357 (1971), and properly has deferred to the legislative judgment in statutory classifications. *Western & Southern*, 451 U.S. at 670-671; *Kahn v. Shevin*, 416 U.S. 351 (1974); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

The degree of judicial deference accorded to legislative acts is particularly great in the precise arena of this challenged legislation. This Court has long held that "[w]here taxation is



concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). A state tax is valid even though it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy." *Allied Stores of Ohio v. Bowers*, 358 U.S. at 528. Here the challenged classification is based upon obvious differences in the relative ability of foreign and domestic insurance companies to benefit the state. *Cf. WHYY v. Glassboro*, *supra*.

**A. A state has a legitimate interest in favoring domestic insurers in order to promote the state's economy by encouraging the formation and continued operation of domestic insurance companies.**

A tax differential reasonably may be conceived as a means to encourage the formation and continued operation of domestic insurance companies. The organization and administration of an insurance company requires a substantial investment of capital. By taxing a domestic insurance company at a lower rate, a state may attempt to ensure that future tax liability will not serve as a deterrent to the formation of such companies.

In *Allied Stores of Ohio v. Bowers*, 358 U.S. at 528, this Court recognized the right of a state legislature to promote and protect a domestic industry:

> "[I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."

In the domestic insurance company, the state gains the type of insurer that is most likely to provide maximum contributions to the state's economy.

The state derives significant economic benefits from the formation and operation of insurance companies within its boundaries. These benefits obviously are distinct from the contributions of foreign insurers. The formation of new insurance companies within the state provides more home office jobs for the state's citizens and generates additional economic activity. *See Life Insurance Fact Book* 91 (1983). The state will also experience significant growth in employment in the numerous industries, such as computers and office equipment, which provide local services to the home offices of insurance companies. This multiplier effect increases the importance of these and other economic contributions of domestic insurance companies. (J.A. 172-173).

The presence of a strong domestic insurance industry contributes to the availability of capital within the state. (J.A. 106-111, 151-155). This Court has acknowledged that an insurer tends to invest greater funds in its state of domicile than in any other state. *Metropolitan Co. v. Brownell*, 294 U.S. 580 (1935). Life insurance companies, for example, place the majority of their assets in long-term investments, such as mortgages, corporate bonds and government bonds. (*See* J.A. 226-228). In addition, insurance companies maintain substantial account balances in local banks to meet the costs of daily operation; property and casualty insurance companies particularly are more likely to maintain relatively large accounts due to their need for daily liquidity. (J.A. 154, 172).



The state also has a separate economic interest in the presence of a strong domestic insurance industry. In the long run this industry tends to be far more stable than other enterprises during periods of economic unrest, recession or depression. (J.A. 154). Overall, promotion of a domestic insurance industry assists local economies, contributes to a state's position as a center of financial growth, and adds to the state's reputation and prestige. Consequently, a law that encourages the location within the state of such a needed and useful industry is not palpably arbitrary and does not violate the Equal Protection Clause. *Allied Stores of Ohio v. Bowers*, supra.

**B. A state has a legitimate interest in favoring domestic insurers in order to guarantee satisfaction of the insurance needs of its citizens.**

It is easy to conceive why domestic insurers can meet more fully the needs of a state's citizens than can foreign insurers. Domestic preference taxation, which encourages the formation and survival of domestic insurers, furthers the state's interest in satisfying its citizens' needs. This Court has recognized that a state, consistent with the Equal Protection Clause, may encourage domestic companies where such companies will benefit the state more than foreign companies. *WHYY v. Glassboro*, 393 U.S. at 120.

By encouraging the presence of a strong and thriving domestic insurance industry, the state takes a step toward guaranteeing that the insurance needs of its citizens will be met during times of economic and social hardship. The business of insurance is not insulated from, but rather reacts to, occurrences in other areas of life. Unfavorable business developments may prompt out-of-state insurers to abandon a particular state market, thus leaving one or more segments of the state's citizens without adequate coverage. A legislature reasonably may believe that a domestic insurer would be less likely to abandon its home state during periods of unfavorable business developments than would a foreign insurer controlled by a corporate boardroom removed by miles, time zones, and national corporate priorities.

These "unfavorable" developments may involve changes in the law, the extent and scope of regulation, or the manner in which such laws are applied by the courts. For example, in the early 1970's, foreign insurers wrote all of the medical malpractice insurance in the State of Michigan. Due to apprehension relating to increased litigation and large jury verdicts, most foreign insurers discontinued writing new medical malpractice coverage and renewing existing policies. Four foreign malpractice insurers, writing 93% of the malpractice coverage in Michigan, refused to issue policies to physicians beginning their practice. Mengel, *The Constitutional and Contractual Challenges to Michigan's Medical Malpractice Arbitration Act*, 59 *U. Det. J. Urb. L.* 319 (1982). To deal with this crisis, the State of Michigan was forced to create a state fund to insure



physicians. M.C.L.A. § 500.2500 *et seq.* The liability which this fund insured subsequently was assumed by a domestic insurance company, Physicians Insurance Company of Michigan. Other unfavorable developments such as hurricanes, epidemics, climactic changes or even riots prompt foreign insurers to curtail their business in a particular state. For example, during the Detroit riots of 1967 several foreign property and casualty insurance companies doing business in Michigan illegally cancelled policies. Letter Opinion of Michigan Attorney General to Insurance Commissioner (August 10, 1967) (unpublished).

A state legislature might reasonably perceive a domestic insurance industry to be an economic resource that is more likely to serve the special insurance needs of a state's citizens. Large foreign insurers, such as appellants, operate on a national scale. In the name of efficiency, such companies must strive for organizational uniformity, standardization and centralization. The foreign insurer, therefore, is unable to devote its attention to the insurance purchasers whose needs are unique to the state or the part of the state in which they reside. Due to the local focus of their business operations, domestic companies are better able to market policies directed specifically at the needs of these citizens. (J.A. 82). A reasonable tax differential thus protects the state's citizens by providing an economic incentive to domestic insurers that serve the less desirable segments of the insurance market in which the huge, out-of-state companies may not be actively or seriously interested.

One example amplifies this point. Residents of rural and agricultural areas are a consumer class which must rely on domestic companies to meet insurance needs. The administrative expense of serving rural and sparsely populated areas tends to be greater than the expense of serving densely populated urban areas. This is especially true of property and casualty insurance, which requires direct contact between the insurer and the policyholder for matters such as claims handling. Personal incomes tend to be lower in rural than in urban areas. Large, foreign insurers seeking high volume and high profit sales reasonably may be presumed to focus their marketing efforts on urban areas where expenses are lower and potential volume higher. The smaller domestic companies located throughout the state have a greater capacity to provide services in remote areas. Tax differentials assist domestic insurers confronting relatively greater expenses in providing service to sparsely populated or low-income areas. (J.A. 98-101, 150, 173-176).

Finally, promotion of the domestic insurance industry through preferential taxation more likely guarantees that an increased number of insureds within the state will have the benefit of effective local regulation of their insurers. States monitor and regulate insurance companies to promote solvency. (J.A. 122-123). A state regulator can better supervise a domestic insurer than a large, sophisticated foreign insurance company whose headquarters and administrative offices are located in another state and whose operations are more geographically dispersed. Dunne, *Risk, Reality and Reason in*



*Financial Services Deregulation: A State Legislative Perspective*, 2 *J. Ins. Reg.* 342, 365-370 (1984). A state often cannot monitor a foreign insurer's investments effectively. When a domestic insurer becomes financially distressed, a state ordinarily attempts to control events carefully and closely by placing the company directly into supervision, rehabilitation, conservatorship or receivership. The same is not true as to foreign companies; a state cannot exercise the same kind of effective control over a company's assets located in other states.

This Court has held that domestic and foreign companies may be treated differently where a state has less capacity to regulate one than the other. *Board of Education v. Illinois*, 203 U.S. 553, 562 (1906). Prior decisions have recognized that "States grappling with nation-wide, but nationally unregulated [insurance] business inevitably exerted their powers to limits and in ways not sought generally to be applied to other business . . . ." *Prudential v. Benjamin*, 328 U.S. 408, 417 (1946). A state tax rate differential based on a domestic/foreign classification provides the benefit of encouraging the type of company — domestic — that is more susceptible to state regulation needed to protect the interests of its citizens.

In short, a domestic preference insurance tax reasonably may be believed to encourage the incorporation and operation of the type of companies most likely to benefit the economy of a state and to meet the needs of its citizens. A state, therefore, may use a differential in its taxation of *insurance* companies and still comply with the dictates of the Equal Protection

Clause. Domestic preference taxation of the insurance business is a valid exercise of state legislative power.

## CONCLUSION

The applicable Equal Protection Clause standard, stripped of irrelevant Commerce Clause concerns, validates the domestic preference tax which Alabama and *amici* states impose on insurance companies doing business within their borders. The judgment of the Alabama appellate court upholding this method of state taxation should be affirmed.

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# BRIEF

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No. 83-1274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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**METROPOLITAN LIFE INSURANCE COMPANY, et al.,**

**Appellants,**

**v.**

**W. G. WARD, Jr., et al.,**

**Appellees.**

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On Appeal from the
Supreme Court of Alabama

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## BRIEF OF AMICI CURIAE ALLSTATE INSURANCE COMPANY, ALLSTATE LIFE INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL ASSURANCE COMPANY, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF APPELLEES

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## BRIEF OF AMICI CURIAE ALLSTATE INSURANCE COMPANY, ALLSTATE LIFE INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL ASSURANCE COMPANY, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND THE ILLINOIS LIFE INSURANCE COUNCIL IN SUPPORT OF APPELLEES

This Brief, in support of Appellees, is submitted in accordance with Rule 36.2 of the Rules of this Court.

## INTEREST OF THE AMICI

Allstate Insurance Company ("Allstate") and State Farm Mutual Automobile Insurance Company ("State Farm") are two of the nation's largest property and casualty insurance companies. Allstate Life Insurance Company ("Allstate Life") and State Farm Life Insurance Company ("State Farm Life")

are life insurance companies affiliated with Allstate and State Farm, respectively. Continental Casualty Company and Continental Assurance Company are subsidiaries of CNA Financial Corporation, respectively writing property-casualty insurance and life insurance. All six companies ("insurer amici") are incorporated in Illinois and do business throughout the United States.

The National Association of Independent Insurers ("NAII") is the nation's largest trade association of property and casualty insurance companies. Its 521 members include major national companies, such as Allstate and Government Employees Insurance Company ("GEICO"), insurance companies operating in particular regions of the country, and small companies operating in only one or two States.

Insurer amici are national insurance companies who do business in domestic preference tax States (other than Illinois) under the handicap of those taxes. To be sure, Illinois provides a tax preference which provides some insurer amici a benefit partially offsetting the burden of domestic preference taxes in other States.[1] Despite this partial offset, insurer amici might

[1] Illinois imposes a 2% tax on most insurance premium income but exempts certain companies incorporated and maintaining principal offices in Illinois. Ill. Rev. Stat. ch. 73, § 1021 (1983). All insurer amici qualify for exemption.

However, Allstate Life and State Farm Life do not even benefit from the Illinois tax differential. Companies subject to the Illinois premium tax are entitled to various credits against that tax, *id.* § 1021(2), which reduce its effective rate, on the average, to 1.5% (rather than the nominal 2%). However, Illinois-incorporated life insurers are subject to a policy valuation charge not imposed on non-Illinois companies. *Id.* § 1020.1. On the average, this fee amounts to 0.61% of net taxable premium. In 1980, a representative year, these fees amounted to 3.04% and 5.06% of what would be (but for the exemption) the net taxable premiums for Allstate Life and State Farm Life, respectively. While such fees are among the credits

(Footnote continued on following page.)



well benefit in the short run from abolition of tax differentials in all States. Nonetheless, amici are concerned that this would ultimately disrupt the dynamics of a long-established, well-functioning, and Congressionally-endorsed system of decentralized regulation. Such disruption should not be risked for the short-term benefit of a few insurance companies.

Amici therefore support the right of States to impose differential premium taxes similar to that in Alabama. Such taxes have long been associated with the historic pattern of decentralized regulation of the insurance industry by the respective States of the Union. This regulatory system, endorsed by Congress in the McCarran-Ferguson Act, has well served both the insurance industry and the insurance buying public.

In particular, differential premium taxes provide a tool for States to enhance their ability to regulate insurers. Such regulation is especially important for newer and smaller companies, which are most likely to operate in only one or a few states. The utility of differential premium taxes for this purpose is illustrated by the statutory structure in Illinois, the home State of insurer amici. Illinois-incorporated insurers are exempt from the Illinois premium tax if they maintain their principal places of business (with all executive officers and key records) in Illinois, keep almost all company-owned securities in Illinois, and conduct in Illinois all underwriting, policy issuing, and policy servicing activities regarding Illinois policies. *Id.* §§ 1021(4), 745(2).[2] As pointed out in the Brief of Amicus

(Footnote continued from preceding page.)

allowed against the premium tax, *id.* § 1021(2), they far exceed the tax and leave Allstate Life and State Farm Life *worse off* than comparable foreign insurers. (Some of these figures quoted appear in the Brief of Amicus Curiae State of Illinois which explains how all of them first came to be computed.)

[2] Alabama, whose tax is at issue in the present case, imposes somewhat similar requirements on companies accorded a preference under that tax. Ala. Code §§ 27-4-1(2)&(3), 27-27-29 (1977 & Supp. 1983).

Curiae State of Illinois, compliance with these requirements facilitates regulation by Illinois of companies seeking the tax exemption and enhances its ability to scrutinize their activities closely.[3] Elimination of differential premium taxes would thus deprive States of a tool which is being used to render State regulation more effective.

Amici have a direct interest in the effectiveness of State regulation. All States now have insurance guaranty funds for property-casualty insurance and about two-thirds have such funds for life insurance.[4] To the extent that State regulation fails to preserve the solvency of financially troubled insurers, the rest of the insurance industry will be forced to bear much or all of the resulting financial burden.

[3] Illinois is recognized as having one of the most advanced systems in the country for monitoring insurer solvency. Dunne, *Risk, Reality and Reason in Financial Services Deregulation: A State Legislative Perspective*, 2 J. Ins. Reg. 342, 365 (1984).

[4] *See* Duncan, *An Appraisal of Property and Casualty Post-Assessment Guaranty Funds*, 2 J. Ins. Reg. 289, 289-91 (1984); Dunne, *Risk, Reality and Reason in Financial Services Deregulation: A State Legislative Perspective*, 2 J. Ins. Reg. 342, 370-73 (1984).



## SUMMARY OF ARGUMENT

States have broad latitude to classify economic activity for purposes of taxation. Such classifications must be sustained if it is reasonably conceivable that they further any legitimate State purpose. States have legitimate interests in seeking to attract insurance company headquarters offices and in enhancing their regulatory power over insurers by assuring that company records, executive personnel, and company-owned securities are located in the State. Appellants have stipulated that the Alabama legislature could reasonably believe that the State's interest in attracting headquarters offices would be furthered by the premium tax differential at issue here; it is obvious that this is also true of a State's interest in enhancing regulatory effectiveness. Accordingly, maintenance of insurance premium tax differentials is within the constitutional power of the States.

## ARGUMENT

### THE EQUAL PROTECTION CLAUSE PERMITS A STATE TO PROVIDE TAX PREFERENCES TO BUSINESSES WHICH CONDUCT DESIRABLE ECONOMIC ACTIVITIES IN THAT STATE AND WHOSE IN-STATE ACTIVITIES FACILITATE STATE REGULATION.

The present challenge to the Alabama premium tax differential arises solely under the equal protection clause of the Fourteenth Amendment.[5] Moreover, it arises in the context of

[5] Appellants concede, as they must, that "insurance companies are not protected by either the Commerce Clause or the Privileges and Immunities Clause." (Brief for Appellants ("App. Br."), 12 (footnotes omitted); *See Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-56 (1981) ("*Western & Southern*"). Notwithstanding this concession, appellants rely on Commerce Clause values (e.g., App. Br. 32-33 & n.27 (hostility to

(Footnote continued on following page.)

taxation of ordinary economic activity, an area in which the demands of equal protection are weakest.[6] *See, e.g., Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973).

As this court stated in *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 87-88 (1940):

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax

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*(Footnote continued from preceding page.)*

discrimination in favor of local business as opposed to interstate businesses)) and Privileges and Immunities Clause decisions (*e.g.*, App. Br. 28 n.22). This aspect of appellants' argument is cogently criticized in the amicus brief of those States, other than Illinois, supporting appellees and that criticism will not be repeated here.

[6] Nonetheless, Appellants seek the benefit of principles announced in contexts calling for more rigorous equal protection scrutiny. For example, they cite *Craig v. Boren*, 429 U.S. 190, 208-09 (1976), for the proposition that "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups." (App. Br. 32.) While this is the rule in the context of gender discrimination, the issue in *Craig*, the general rule, applicable here, is otherwise.

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step in such economic areas, adopting regulations that only partially ameliorate a perceived evil to future regulations. . . . [I]n the local economic sphere, it is only the invidious discriminatory, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."

*City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976).



> programs to local needs and wages in order to achieve an equitable distribution of the tax burden. . . . [I]n taxation even more than in other fields, legislatures possess the greatest freedom in classification. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes. *The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.*" (Footnotes omitted, emphasis added).

*Accord, Allied Stores Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959).

To prevail under this standard, appellants must demonstrate that the classification made by the premium tax differential "'could not reasonably be conceived'" to be rationally related to *any* legitimate purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), *quoting Vance v. Bradley*, 440 U.S. 93, 111 (1979). The reasons justifying the classification, moreover, need not appear on the face of the statute. Rather, the classification must be upheld if any state of facts that would sustain it can reasonably be conceived.[7] *Allied Stores, Inc. v. Bowers*, *supra*, at 525-29.

As noted in the Brief of Amicus Curiae State of Illinois, the purposes of the Illinois premium tax differential include attraction of insurance company headquarters offices (with the employment they and their local suppliers generate) and the facilitation of State regulation resulting from the location of records, executive personnel, and company-owned securities in the State. Nothing in the record indicates that these purposes may not have been among those which Alabama sought to accomplish with its premium tax differential (tied, like that of Illinois, to requirements that the principal office, records, and

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[7] The absence of formal legislative history of the Alabama statute (App. Br. 32 n.26) or other legislative statement of the purposes now advanced in its defense is, therefore, of no consequence.

most assets be located in the State). Indeed, appellants concede that "persuading insurance companies to . . . locate in Alabama," was found by the Alabama courts to be one of the purposes of the Alabama premium tax differential. (App. Br. 30, 24; J.S. App. 8a.)

> The legitimacy of these purposes can hardly be doubted.
>
> "[I]t has been repeatedly held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."

*Allied Stores Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959) (citations omitted). Similarly, tax preferences for domestic corporations have been found valid where reasonably related to the "greater control and direction the state had over domestic than over foreign corporations." *Board of Education* v. *Illinois*, 203 U.S. 553, 562 (1906). This latter consideration is especially relevant to "States grappling with nation-wide, but nationally unregulated business," such as insurance. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 417 (1946).

Appellants have stipulated (J.S. App. 2a), that the Alabama legislature could have reasonably believed that the Alabama premium tax differential would promote the purposes found by the Alabama courts, including the attraction of insurance company headquarters to Alabama. It is also obvious that the Alabama legislature could have reasonably believed that the differential would ease the burden of regulating insurers for the benefit of insureds residing in the State.

A principal function of State insurance regulation is to assure the solvency of companies which insure residents of the State. It is obviously more difficult to supervise foreign insurers whose records, executives, and assets are located in other states. Donze, *Risk, Reality and Reason in Financial Services Deregulation: A State Legislative Perspective*, 2 J. Ins. Reg. 342, 365-70 (1984). It is particularly impractical to monitor a foreign insurer's investments. *Id.* at 344, 366-67. Both for this reason and because of the remoteness of the executive officers, informal means of prevention or correction of solvency problems are markedly less effective when applied to insurers based outside the State.



Moreover, when the solvency of a domestic insurer becomes endangered, a State has a variety of methods available to exert whatever degree of control over events is deemed necessary or appropriate. *See, e.g.*, Ill. Rev. Stat. ch. 73, §§ 799 *et seq.* (1983); Ala. Code §§ 27-32-1 *et seq.* (1977). Similar control over a foreign company is limited by the fact that its headquarters and assets are located outside the State, beyond the jurisdiction of local regulators.

States thus have legitimate economic and regulatory interests which they can reasonably believe will be furthered by providing insurance companies tax incentives to locate within the State. Appellants do not deny either the legitimacy of such purposes or the rationality of a belief that they would be promoted. Nonetheless, they assert that such purposes cannot justify a tax differential, relying upon a line of cases in which the Court has condemned property tax differentials based solely upon foreign incorporation.[9]

In these cases, the Court concluded that the difference in treatment was not justified by even "the slightest difference in [the taxing State's] relation to the decisive transaction," so that the corporation taxed had been denied equal protection.

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[9] *See WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968); *Reserve Life Insurance Co.* v. *Bowers*, 380 U.S. 258 (1965) (mem.); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949); *Concordia Fire Insurance Co.* v. *Illinois*, 292 U.S. 535 (1934); *Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494 (1926); *Southern Railway Co.* v. *Greene*, 216 U.S. 400 (1910).

*WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117, 120 (1968), *quoting Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 572 (1949). These cases are inapposite here for two reasons.

First, in none of the cases ruled upon by appellants was there any suggestion of a regulatory justification for the tax differential at issue. Where such interests have been advanced, they have been found sufficient to sustain differential taxation. *Board of Education* v. *Illinois*, 203 U.S. 553, 562 (1906); *cf. WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117, 120 (1968) (State effort to justify tax distinction based on ease of regulation rejected because, on the facts there, it was no more difficult to regulate foreign corporations). Moreover, the regulatory justification takes on special significance here, in light of the Congressional decision to entrust virtually all regulation of the insurance industry to the several States. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1982).

The second reason why appellants' cases are inapposite is that they involve differences in treatment based solely upon the place of incorporation, a legal formality with no necessary relation to the nature or extent of the taxpayer's activities in the taxing State. Here, in contrast, the tax preference does not depend solely on the place of incorporation but requires that a company seeking the preference engage in a particular type of in-state economic activity which the State desires to encourage, *i.e.*, the maintenance of its principal office in the State. States have long offered incentives (tax preferences, favorable financing, use of eminent domain to assemble property, etc.) to attract and retain business and facilities which the States found desirable. This Court has never questioned the propriety of such incentives under the Equal Protection Clause.[9]

To be sure, the tax preference in this case is not available to foreign corporations, even if they maintain their principal

[9] It should be noted that *Berkshire Mutual Ins. Co.* v. *Flint*, 270 U.S. 421 (1921), relied upon at App. Br. 8 n.8, 13 n.12, 29 n.23, is fully consistent with this analysis. There, North Carolina had

(Footnote continued on following page.)



offices in Alabama. However, even if this feature of the statute were found invalid, none of the appellants would be eligible for the preference, as none of them has its principal office in Alabama.[10] Thus, so long as the location of the company's principal office is a permissible basis for determining whether it shall be accorded a tax preference, appellants are not injured by the state of incorporation aspect of the statute.

Appellants do assert that neither place of incorporation nor location of these company's principal office is a permissible basis for granting a tax preference because "[b]y either definition, domestic preference taxation would deny a foreign company equality in all but one or two places where it can claim domiciliary status." (App. Br. 28 n.22.) However, the Equal Protection Clause does not require that a company be granted equality in more than one or two states, so long as the states denying such equality have some rational basis—such as the conduct of particularly desirable activities in the State—for granting a preference to others. *Western & Southern*, 451 U.S. at 667 n.21, 668-74.

(Footnote continued from preceding page.)

accorded a tax preference to automobile manufacturers with at least three-quarters of their assets in the State and this Court held that preference invalid. However, the problem with that statute was that the preference depended not on the extent of the taxpayer's activities in the State but rather upon the absence of significant activities outside the State. (In this regard, the statute in *Berkshire Mutual* bears some resemblance to the "investment credit" aspect of Alabama's premium tax. Ala. Code § 27-4-4(b) (1977).) While a State has a legitimate interest in attracting as much economic activity as possible to itself, it has no similar interest in suppressing such activity elsewhere. Of course, since a company can have but one principal office, attraction of that office to one State prevents its location in another State. However, that is like any other competition between States for desirable businesses and the Equal Protection Clause does not require States to subordinate their own interests to the interests of others. *Western & Southern*, 451 U.S. at 671.

[10] Locations of the principal offices of all appellants can be found in either BEST'S INSURANCE REPORTS, LIFE-HEALTH (1983) or BEST'S INSURANCE REPORTS, PROPERTY-CASUALTY (1983).

## CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Alabama should be affirmed.

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# AMICUS CURIAE

# BRIEF

Office Supreme Court, U.S.
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No. 83-1274

In The

# Supreme Court of the United States

October Term, 1983

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.,

*Appellants,*

v.

W.G. WARD, JR., ET AL.,

*Appellees.*

Appeal From The Supreme Court Of Alabama

## BRIEF OF AMICUS CURIAE STATE OF ILLINOIS

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## BRIEF OF AMICUS CURIAE STATE OF ILLINOIS

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This Brief in support of appellees is submitted in accordance with Rule 36.4 of the Rules of this Court.

## INTEREST OF AMICI CURIAE

Like Alabama and the supporting amici states, the State of Illinois differentiates in the taxation of premiums collected from foreign and qualified domestic insurers in this State. Illinois has a substantial interest in preserving its existing system of taxation and regulation of the insurance industry to effectuate legitimate state goals which benefit the State and protect Illinois citizens.

Illinois levies a 2% privilege tax on the net taxable premium income of insurance companies. However, an insurance company incorporated in Illinois is exempt from this tax if it meets four criteria. The company must: a) maintain its principal place of business in Illinois; b) have officers and agents in Illinois knowledgeable of and responsible for the company's operations and books and records; c) conduct in Illinois all of its operations relating to the issuing to and servicing of policies of Illinois policyholders; and d) maintain books and records in Illinois, in a manner whereby the company's financial status and compliance with the law can be readily determined. Ill. Rev. Stat. ch. 73, §§1021(4), 745 (1983).[1] (The full text of all cited Illinois statutory provisions are reprinted in the Appendix to this Brief.) Under the Illinois structure, then, those domestic companies not fully amenable to local control and taxation are subject to the premium tax.

By providing the exemption to those companies substantially involved in Illinois, the General Assembly sought to accomplish a number of purposes. First, the Illinois premium tax encourages the location of administrative facilities and personnel in Illinois, creating employment not only within the insurance industry itself, but also within local businesses providing ancillary services to the insurers.

Second, the tax facilitates regulation of insurance company operations by the State of Illinois. The exemption provides an incentive for insurance companies to qualify by locating their books and records as well as administrative

[1] Prior to 1974 all domestic insurance companies were exempted from the Illinois premium tax statute simply by virtue of incorporation in this State. Ill. Rev. Stat. ch. 73, §1021 (1973). In 1974, the Illinois General Assembly amended the statute to exclude from the exemption those domestic insurers who lacked sufficient contact with Illinois.



and executive operations within Illinois. The exemption thereby eases the regulatory burden on State officials by making relevant company information more accessible and allowing State officials greater flexibility in dealing with financially troubled companies. Proper state regulation of the insurance industry results in greater protection for policyholders in Illinois.

Third, the premium tax protects fully domesticated companies from being placed at a tax disadvantage as against their foreign competitors. The apparent 2% differential between companies subject to the Illinois tax and those exempt from that tax is mitigated by the deduction allowed for income tax paid, which makes the average effective rate of the premium tax only 1.5%. Foreign companies do not pay the fees paid by domestic companies for the valuation of life insurance policies. On the average, this fee has an effective rate of 0.61%. Thus, the premium tax differential between life insurance companies subject to and those exempt from the tax is only 0.89%. Moreover, some Illinois life insurance companies pay policy evaluation fees exceeding 2% of their net taxable premiums. Thus, life insurers subject to the premium tax have a lower Illinois tax burden than some of their Illinois counterparts. The premium tax thus serves the purpose of alleviating the competitive disadvantage Illinois companies are under because of their more extensive subjection to local taxes.[2]

[2] The foregoing figures were developed in connection with litigation commenced by some of the appellants in this case challenging the validity of the Illinois premium tax differential. *Prudential Ins. Co. v. O'Connor*, Nos. 81 CH 5332, 81 CH 5351, 81 CH 5352, 81 CH 5355, 81 CH 8220, 81 CH 8350 (Cir. Ct. Ill.). The figures were placed of record in that litigation in support of a motion for summary judgment filed by the defendants in that action. Shortly before their brief on that motion was due, the plaintiff insurers voluntarily dismissed the action, although without prejudice to any future challenge to the statute.

The accomplishment of these Illinois purposes might be hindered should this Court strike down differential premium taxes as unconstitutional *per se*, as appellants and some amici request. Illinois therefore supports fully the specific arguments made by the appellees on behalf of the Alabama tax statute involved in No. 80-1274 and the general arguments made by amici curiae on behalf of differential premium taxes. Illinois also urges this Court to recognize the validity of this State's statute in its considerations.

## SUMMARY OF ARGUMENT

Except for the extremely unusual case of a foreign insurance company which has completely domesticated itself in Illinois, but has not incorporated in the State, the Illinois privilege tax on premium income is not related to the place of incorporation of the insurance company involved. Rather, a domestic company is exempt from the tax only if it meets the conditions set forth in the statute which guarantee the company's full responsiveness to local regulation and local control. These conditions which exempt most domestic insurers are exactly those factors inherently lacking in a foreign company which has not completely domesticated itself. More effective regulation by the state of companies meeting the exemption requirements of the Illinois premium tax is a factor which bears a rational relation to legitimate state purposes and which the Illinois legislature reasonably believed would be promoted when it created the taxing system. *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 668 (1981).



## ARGUMENT

Appellants and the amici states of Connecticut, Massachusetts, New Hampshire and Rhode Island argue that differential premium taxes are inherently unfair. Pursuant to this Court's decision in *Western & Southern Life Insurance Company v. Board of Equalization*, 451 U.S. 648 (1981) (*Western & Southern*), they contend that premium taxes must be invalidated because there can be no legitimate purpose in imposing higher taxes on foreign insurance companies than on domestic insurers. (*See Brief of Amici Curiae*, pp. 8-11) This conclusion is erroneous.

Prior to this Court's decision in *Western & Southern*, privilege taxes were presumed to be valid and states were permitted to impose more onerous burdens on foreign corporations conducting business within the states without equal protection scrutiny. *Lincoln Nat'l Life Ins. Co. v. Read*, 325 U.S. 673, 677-78 (1945). After *Western & Southern*, while privilege taxes are no longer immune from equal protection analysis, where legitimate state purposes and interests are shown to exist, such taxes will be upheld. *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. at 668.

Alabama has advanced two state purposes in adopting its premium tax: a) to encourage the formation and continued operation of domestic insurance companies; and b) to promote investment of capital in the State. This Court has recognized the states' interest in the attraction and promotion of industry as a legitimate objective in tax legislation. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970). The protection of finite state resources also

constitutes a legitimate state purpose. *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 390 (1978).

Both the Alabama and Illinois taxing statutes limit the premium tax preference to companies which have their principal places of business within the states. Both statutes thereby encourage corporations to locate in the states, thus providing employment and the accompanying concentration and infusion of capital into the states. The Illinois taxing system also promotes the legitimate purposes of regulation of insurance companies and fairness of taxation.

Under Illinois law, a foreign insurance company is not required, as is a domestic insurer, to keep books and records in Illinois "in such a manner that its financial condition can be ascertained and so that its financial statements filed with the Director [of Insurance] can be readily verified and its compliance with the law determined. . . ." Ill. Rev. Stat. ch. 73, §745 (1969). Nor are foreign insurers subject to the annual check of valuation of life insurance policies for the purpose of establishing the reserves necessary to protect policyholders and the accompanying fee levied by the State. Ill. Rev. Stat. ch. 73, §1020.1 (1969). As a further example, Illinois insurance companies, but not foreign companies, must use vouchers or checks for all disbursements over $100, to prevent bribery and malfeasance; and domestic insurers' agency contracts are subject to strict requirements which protect policyholders from excessive premiums or lack of control over agents by the company itself. Ill. Rev. Stat. ch. 73, §§752, 753 (1969).

In connection with protection of policyholders upon rehabilitation, liquidation or dissolution of insurance companies, the Illinois Director of Insurance can act in respect to foreign insurance companies under some 11 circumstances listed in the statute and only in relation to those assets located in Illinois. Ill. Rev. Stat. ch. 73, §909 (1969). With respect to domestic insurance companies, however, the Director can exercise his authority over the companies' entire operations and assets in some 15 listed situations. Ill. Rev. Stat. ch. 73, §§730, 900, 900.1 (1969).



This greater regulatory power, even when not formally exercised, facilitates the Director's ability to obtain speedy informal compliance with his suggestions for preventive and/or corrective actions, thus additionally enhancing his ability to protect the public. Such informal regulation is also facilitated by the frequency of contact between regulatory officials and insurance executives whose principal offices are in Illinois. Illinois policyholders benefit from the operation of the exemption because insurance companies are enabled to provide better and more responsive insurance service to Illinois policyholders due to the more readily accessible records, offices and personnel which must be located in Illinois. Regulating companies to protect policyholders and to assure the public prompt and efficient service reasonably justifies a distinction between domestic insurance companies having extensive local connections and operations and foreign insurance companies whose principal offices, records and responsible officials are usually elsewhere and who are not subject to many of the regulations covering domestic corporations.

In addition to the policy valuation tax paid by some Illinois life insurance companies which is more than the nominal 2% (and actual 0.89% average) premium tax paid by their foreign competitors, all domestic companies having principal offices in Illinois and convenient servicing relations with Illinois policyholders have offices and property in Illinois which will subject them more extensively than the

usual foreign company to local real estate taxes and to sales and other taxes. Illinois has a legitimate state interest in seeing that its own companies are not subject to too much greater a tax burden in Illinois than their foreign competitors.

Thus, Illinois makes a classification between domestic companies having extensive local connections required by subparagraphs 4(a) through (d) of its statute for exemption from the premium tax and foreign companies having no such local connections and not subject to the same range of regulation and taxation. *Board of Education v. Illinois*, 203 U.S. 553, 562 (1906). The use of this classification to tax the latter group is, Illinois submits, a reasonable step in the furtherance of legitimate state purposes. The Illinois premium tax is, therefore, clearly consistent with equal protection principles. *Western & Southern*, 451 U.S. at 674; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959).

## CONCLUSION

For the reasons stated in the Brief of appellees and the Brief amicus curiae of the supporting states the imposition of premium differential taxes on foreign insurance companies should be held valid under the Equal Protection Clause.



For the reasons stated in this Brief on behalf of the State of Illinois, the annual premium tax of the type imposed by Section 1021 of Chapter 73 of the Illinois Revised Statutes should not, in any event, be invalidated under any rationale of decision which this Court may reach in this case.

Respectfully submitted,

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# APPENDIX

## ILLINOIS REVISED STATUTES (1983)

### 745. Books, records, accounts and vouchers

§ 133. Books, records, accounts and vouchers. (1) Every domestic company shall keep its books, records, documents, accounts and vouchers in such manner that its financial condition can be ascertained and so that its financial statements filed with the Director can be readily verified and its compliance with the law determined and may cause any or all such books, records, documents, accounts and vouchers to be photographed or reproduced on film. Any such photographs, microphotographs, or film reproductions of any original books, records, documents, accounts and vouchers shall for all purposes be considered the same as the originals thereof and a transcript, exemplification or certified copy of any such photograph, microphotograph or film reproduction shall for all purposes be deemed to be a transcript, exemplification or certified copy of the original. Any original so reproduced may thereafter be disposed of or destroyed if provision is made for preserving and examining such reproductions.

(2) All such original books, records, documents, accounts and vouchers, or such reproductions thereof, of the home office of any domestic company or of any principal United States office of a foreign or alien company located in this State shall be preserved and kept available in this State for the purpose of examination and until authority to destroy or otherwise dispose of such records is secured from the Director. Such original records may, however, be kept and maintained outside this State if, according to a plan adopted by the company's board of directors and approved by the Director, it maintains suitable records in lieu thereof. Every domestic company shall keep its securities within the State of Illinois except where:

(a) on deposit with other states of the United States of America, or political subdivision thereof; or

(b) on deposit with foreign countries where the company is licensed to transact an insurance business; or

(c) where requisite for the normal transaction of the company's business and approved by the Director; or

(d) where held in safekeeping accounts meeting the requirements of subsection (3) of this Section.

(3) Any domestic company may maintain with a corporation qualified to administer trusts in this State under "An Act to provide for and regulate the administration of trusts by trust companies",[1] for its securities a limited agency, custodial or depository account, or other type of account for the safekeeping of those securities, collecting the income from those securities and providing supportive accounting services relating to such safekeeping and collection, provided, the domestic company maintains full investment discretion over those securities. Such a corporation in safekeeping such securities shall have all the powers, rights, duties and responsibilities as it has for holding securities in its fiduciary accounts under "An Act concerning the powers of corporations authorized to accept and execute trusts, to register and hold securities of fiduciary accounts in bulk and to deposit same with a clearing corporation".[2]

(4) Any director, officer, agent or employee of any company who destroys any such books, records or documents without the authority of the Director in violation of this section or who fails to keep the books, records, documents, accounts and vouchers required by this section shall be guilty of a business offense and shall be fined not more than $5000.00.

Amended by P.A. 83-696, § 1, eff. Jan. 1, 1984.

[1] Chapter 17, ¶ 1551 et seq.

[2] Chapter 17, ¶ 2051 et seq.



**752. Vouchers for disbursements**

§ 140. Vouchers for Disbursements. No domestic company shall make any disbursement of one hundred dollars or more unless the same be evidenced by a voucher or receipt signed or check endorsed by or on behalf of the person receiving the money and describing the consideration for the payment, and if the expenditure be in connection with any matter pending before any legislative or public body or before any department or officer of any state or government the voucher shall describe the nature of the matter and the interest of the company therein, or if such voucher cannot be obtained, the expenditure shall be evidenced by affidavit describing its character and object and stating the reasons for not obtaining such voucher, receipt or check.

**753. Agency contracts**

§ 141. Agency Contracts. (1) No domestic company authorized to do an insurance business in this State shall make a contract with any person (different legal entities, directly or indirectly owned or controlled by the same person shall be considered as a person within the meaning of this Section) whereby such person is granted the right or privilege to solicit, procure, write or produce a major part of the insurance business for such company and collect premiums therefor unless such contract is filed with and approved by the Director. Failure of the Director to disapprove any such contract within thirty days after the same shall be filed with him, shall constitute his approval thereof. Such disapproval shall be in writing, stating the reasons therefor and a copy thereof delivered to the company.

(2) The Director shall not approve any such contract which

(a) subjects the company to excessive charges for expenses or commissions; or

(b) vests in the agent or agency company any control over the management of the affairs of the insurance company to the exclusion of the board of directors of the insurance company; or

(c) gives to such person, the right to solicit, procure, write or produce a major part of the insurance business for such insurance company and collect the premiums for such unreasonable period as may jeopardize the security of policyholders.

(3) The Director, for the purpose of ascertaining the assets, conditions and affairs of any person having a contract as provided in subsection (1), may examine the books, records, documents and assets of such person directly relating thereto.

(4) The Director may, after a hearing held pursuant to Section 401,[1] withdraw his approval of any agency contract theretofore approved by him, if he finds that the bases of his original approval no longer exist, or that the contract has, in actual operation, shown itself to be subject to disapproval on any of the grounds referred to in subsection (2) above.

Amended by Laws 1967, p. 2068, eff. July 26, 1967.

[1] Paragraph 1013 of this chapter.

## ARTICLE XIII. REHABILITATION, LIQUIDATION, CONSERVATION AND DISSOLUTION OF COMPANIES

### 799. Scope of article

§ 187. Scope of Article. (1) This article shall apply to every corporation, association, society, order, firm, company, partnership, individual, and aggregation of individuals to which any article of this Code is applicable, or which is subject to examination, visitation or supervision by the Director under any provision of this Code or under any law of this State, or which is engaging in or proposing or attempting to engage in or is representing that it is doing an insurance or surety business, including the



exchanging of reciprocal or inter-insurance contracts between individuals, partnerships and corporations in this State, or which is in the process of organization for the purpose of doing or attempting or intending to do such business, anything as to any such corporation, association, society, order, firm, company, partnership, individual or aggregation of individuals provided in this Code or elsewhere in the laws of this State to the contrary notwithstanding.

(2) The word "company" as used in this article includes all of the corporations, associations, societies, orders, firms, companies, partnerships, and individuals specified in subsection (1) of this section and the word "assets" as used in this article includes all deposits and funds of a special or trust nature.

Amended by Laws 1959, p. 1422, eff. July 17, 1959.

### 800. Grounds for rehabilitation and liquidation of domestic company

§ 188. Grounds for Rehabilitation and Liquidation of Domestic Company. Whenever any domestic company

1. is insolvent;

2. has refused to submit its books, papers, accounts, records or affairs to the reasonable inspection or examination of the Director or his actuaries, supervisors, deputies, or examiners;

3. has concealed, removed, altered, destroyed or failed to establish and maintain books, records, documents, accounts, vouchers and other pertinent material adequate for the determination of its financial condition by examination under Section 132[1] or has failed to properly administer claims and to maintain claims records which are adequate for the determination of its outstanding claims liability;

4. has neglected or refused to observe an order of the Director to make good within the time prescribed by law any deficiency, whenever its capital and minimum required

surplus, if a stock company, or its required surplus, if a company other than stock, has become impaired;

5. has, by articles of consolidation, contract of reinsurance or otherwise, transferred or attempted to transfer its entire property or business not in conformity with this Code, or entered into any transaction the effect of which is to merge substantially its entire property or business in any other company without having first obtained the written approval of the Director under this Code;

6. is found to be in such condition that its further transaction of business would be hazardous to its policyholders, or to its creditors, or to the public;

7. has violated its charter or any law of this State or has exceeded or is exceeding its corporate powers;

8. has an officer who has refused upon reasonable demand to be examined under oath touching its affairs;

9. is found to be in such condition that it could not meet the requirements for organization and authorization as required by law, except as to the amount of the original surplus required of a stock company in Section 13,[2] and except as to the amount of the surplus required of a mutual company in excess of the minimum surplus required by this Code to be maintained;

10. has ceased for the period of one year to transact insurance business;

11. has commenced, or has attempted to commence, any voluntary liquidation or dissolution proceeding, or any proceeding to procure the appointment of a receiver, liquidator, rehabilitator, sequestrator, or a similar officer for itself;

12. is a party, whether plaintiff or defendant in any proceeding in which an application is made for the appointment of a receiver, custodian, liquidator, rehabilitator, sequestrator, or similar officer for such company or its property, or a receiver, custodian, liquidator, rehabilitator, sequestrator or similar officer, for such company or its



property is appointed by any court, or such appointment is imminent;

13. consents by a majority of its directors, stockholders or members;

14. has not organized and obtained a certificate authorizing it to commence the transaction of its business within the period of time prescribed by the sections of this Code under which it is or proposes to be organized; or

15. has refused or neglected to pay any valid final judgment within 30 days after the rendition thereof, or whenever it appears to the Director that any person has committed a violation of Article VIII½[3] with the result described in Section 131.26,[4] then the Director must report any such case to the Attorney General of this State whose duty it shall be to apply forthwith by complaint on relation of the Director in the name of the People of the State of Illinois, as plaintiff, to the circuit court of the county in which such company has, or last had its principal office, for an order to rehabilitate or liquidate the defendant company as provided in this article, and for such other relief as the nature of the case and the interests of its policyholders, creditors, members, stockholders or the public may require. Instead of the county where the company has or last had its principal office, such application may be made to the Circuit Court of Cook County or the Circuit Court of Sangamon County in any case where the complaint is based on the facts set forth in one or more of paragraphs 9, 12, or 13 of this Section.

When upon investigation, the Director finds that the controlling interest of any domestic insurance company has been acquired by another corporation and that the purchasing corporation is operating the a quired company in a manner which appears to be detrimental to the interests of the persons insured, minority shareholders and the general public, the Director may after notice and hearing under Article XXIV[5] issue an order stating such finding and report such case to the Attorney General of this State

whose duty it is to apply forthwith by complaint on relation of the Director in the name of the People of the State of Illinois, as plaintiff, to the circuit court of the county in which such acquired or controlled company has, or last had its principal office, for an order to appoint the Director receiver to assume control of the assets and operation of the company pending a complete investigation and determination of the rights of the policyholders, shareholders and the general public.

Amended by P.A. 80-546, § 1, eff. Oct. 1, 1977.

[1] Paragraph 744 of this chapter.

[2] Paragraph 625 of this chapter.

[3] Paragraph 743.1 et seq. of this chapter.

[4] Paragraph 743.26 of this chapter.

[5] Paragraph 1043 et seq. of this chapter.

### 800.1. Provisions for conservation of assets of domestic company

§ 188.1. Provisions for Conservation of Assets of Domestic Company. (1) Upon the filing by the Director of a verified petition alleging

(a) that with respect to a domestic company a condition exists that would justify a court order for proceedings under Section 188,[1] and

(b) that the interests of creditors, policyholders or the public will probably be endangered by delay, then the circuit court of Sangamon or Cook County or the circuit court of the county in which such company has or last had its principal office, shall issue forthwith without a hearing its order directing the director to take possession and control of the property, business, books, records, and accounts of the company, and of the premises occupied by it for the transaction of its business, or such part of each as the petition shall specify, and enjoining the company and its officers, directors, agents, servants, and employees from disposition of its property and from transaction of its business except with the concurrence of the Director until the further order of the court.



(2) The order shall continue in force and effect for such time as the court deems necessary for the Director to ascertain the condition and situation of the company. On motion of either party or on its own motion, the court may from time to time hold such hearings as it deems desirable, and may extend, shorten, or modify the terms of, the seizure order. So far as the court deems it possible, the parties shall be given adequate notice of such hearings. As soon as practicable, the court shall vacate the seizure order, either when the Director has failed to institute proceedings under Section 188 having a reasonable opportunity to do so, or upon an order of the court pursuant to such proceedings.

(3) Entry of a seizure order under this section shall not constitute an anticipatory breach of any contract of the company.

(4) The court may hold all hearings in conservation proceedings privately in chambers, and shall do so on request of any officer of the company proceeded against.

(5) In conservation proceedings and judicial reviews thereof, all records of the company, other documents, and all insurance department files and court records and papers, so far as they pertain to and are a part of the record of the conservation proceedings, shall be and remain confidential except as is necessary to obtain compliance therewith, unless and until the court, after hearing arguments in chambers from the Director and the company, shall decide otherwise, or unless the company requests that the matter be made public.

(6) Any person having possession of and refusing to deliver any of the property, business, books, records or accounts of a company against which a seizure order has been issued shall be guilty of a Class A misdemeanor.

Amended by P.A. 77-2699, § 1, eff. Jan. 1, 1973.

[1] Paragraph 800 of this chapter.

### 809. Grounds for conservation of assets of foreign or alien company

§ 197. Grounds for Conservation of Assets of Foreign or Alien Company. (1) Whenever any of the grounds for rehabilitation or liquidation of domestic companies specified in subparagraphs 1, 2, 3, 4, 5, 6, 7, 8, 11, 12 and 15 of Section 188,[1] arise or exist with reference to any foreign or alien company authorized to transact the business of insurance in this State and having assets in this State, the Director may proceed, by the filing of a complaint as provided in this article against domestic companies, for an order directing the Director to take possession of its assets in this State and conserve such assets for the benefit of its creditors and for such other relief as the nature of the cause and the interests of its policyholders, creditors, members, stockholders or the public may require.

(2) The court shall have jurisdiction to issue injunctions and to enter such other orders as it may deem necessary as is provided in the case of a complaint against a domestic company so far as such injunctions or orders may apply to such foreign or alien company. If the court finds that sufficient cause for conservation exists, it shall direct the Director to take possession of the property, business and affairs of the company and to conserve the same.

(3) Upon the entry of such order, the Director shall forthwith take possession of the property, business and affairs of such foreign or alien company, and conserve the same. He shall retain such possession until, on the petition either of the Director by the Attorney General, or of such foreign or alien company, or its receiver or anyone in charge of the property, business and affairs of such foreign or alien company in its domiciliary state or country, the court, after a full hearing, shall find that the ground for such order finding cause for conservation has been removed.



(4) The rights, powers and duties of the Director as such conservator, with reference to the assets of a foreign or alien company shall be ancillary to the rights, powers and duties imposed upon any receiver or other person, if any, in charge of the property, business and affairs of such company in its domiciliary state or country.

Amended by P.A. 82-498, § 4, eff. Sept. 16, 1981.

[1] Paragraph 800 of this chapter.

### 1020.1 Fee for valuation of life insurance policies

§ 408.1. Fee for valuation of life insurance policies. The Director shall charge and collect an annual fee from every domestic company for the valuation of life insurance policies except group contracts awarded under the State Employee Group Insurance Act of 1971, as now or hereafter amended.[1] The fee shall be 3¢ for each $1,000 of direct life insurance policies in force as of December 31, each year, but not less than $100. Each domestic company shall pay the fee under this Section not later than 60 days after the date on which such company is required to file its annual statement for the preceding calendar year, under this Code. Failure of a company to make payment as required shall subject it to the penalty provisions set forth in Section 412 of this Act.[2]

Added by P.A. 81-603, § 1, eff. Jan. 1, 1980.

[1] Chapter 127, ¶ 521 et seq.

[2] Paragraph 1024 of this chapter.

**1621. Annual privilege tax payable by foreign or alien companies**

§ 409. Annual Privilege Tax Payable by Foreign or Alien Companies. (1) Every foreign or alien company doing an insurance business in this State, except fraternal benefit societies, shall, for the privilege of doing business in this State by renewal of certificate of authority as provided in Section 114,[1] pay to the Director for the State treasury a State tax equal to 2 per cent of the net taxable premium income, together with any amounts due under Section 444.[2] Every domestic insurance company, except a fraternal benefit society, which fails to comply with all the requirements of subsection (4) of this Section must pay to the Director for payment into the State Treasury a State tax equal to 2 per cent of the net taxable premium income and upon the failure of any company to pay any such tax due, the Director may, by order, revoke the company's certificate of authority after giving 20 days written notice to the company. The gross taxable premium income shall be the gross amount of premiums received on direct business during the preceding calendar year on contracts covering risks in this State, except premiums on annuities and except premiums on group insurance contracts awarded after the effective date of this amendatory Act of 1976 under the State Employees Group Insurance Act of 1971, approved July 27, 1971, as now or hereafter amended,[3] and except premiums for deferred compensation plans for employees of the State, units of local government or school districts. The net taxable premium income shall be the gross taxable premium income reduced only by the following:

(a) the amount of premiums returned thereon which shall be limited to premiums returned during the preceding calendar year and shall not include the return of cash surrender values or death benefits on life policies;

(b) dividends on such direct business that have been paid in cash, applied in reduction of premiums or left to accumulate to the credit of policyholders or annuitants.



In the case of life insurance, no deduction shall be made for the payment of deferred dividends paid in cash to policyholders on maturing policies; dividends left to accumulate to the credit of policyholders or annuitants shall be included as gross taxable premium income when such dividend accumulations are applied to purchase paid-up insurance or to shorten the endowment or premium paying period.

(2) There shall be deducted from the tax thus computed, but only to the extent thereof, the amount, if any, paid during the preceding calendar year: (a) for the benefit of organized fire departments, to cities, villages, incorporated towns and fire protection districts of this State as a tax on premiums received by such company in such cities, villages, incorporated towns and fire protection districts, and (b) as a tax to this State or any subdivision thereof on or measured by net income, and (c) as a tax to this State or any subdivision thereof on or measured by the value of the company in excess of the value of its tangible property, and (d) as a fee or charge for the valuation of life insurance policies, and the remainder shall be paid by such company as its annual privilege tax.

(3) If a company survives or was formed by a merger, consolidation, reorganization or reincorporation, the premiums received, and amounts returned or paid, by all foreign or alien companies parties to such merger, consolidation, reorganization or reincorporation, shall, for the purposes of determining the amount of the tax imposed by this section, be regarded as received, returned or paid by such surviving or new company.

(4) A domestic company must pay the State tax in subsection (1) of this Section unless:

(a) it maintains its principal place of business in this State; and

(b) it maintains in this State officers and personnel knowledgeable of and responsible for the company's operation, books, records, administration, and annual statement; and

(c) it conducts in this State substantially all of its underwriting, policy issuing, and serving operations relating to Illinois policyholders and certificate holders; and

(d) it complies with the provisions of Section 133(2) of this Code.[4]

Payments shall be due on an estimated basis for all of calendar year 1969 on or before September 1, 1969. Effective January 1, 1970, a company shall make an annual return for the preceding calendar year on or before March 1st setting forth such information on such forms as the Director may reasonably require. Payments of quarterly installments of the taxpayer's total estimated tax for the current calendar year shall be due on or before April 15th, June 15th, September 15th and December 15th, unless for the calendar year 1971, and each calendar year thereafter, insurers transacting insurance in this State whose annual tax for the preceding calendar year was less than $5,000, shall then make only an annual return. Failure of a company to make quarterly payments, if required, of at least one-fourth of either (a) the total tax paid during the previous calendar year or (b) 80% of the actual tax for the current calendar year shall subject it to the penalty provisions set forth in Section 412 of this Act.[5]

Amended by P.A. 81-1509, Art. I, § 48, eff. Sept. 26, 1980.

[1] Paragraph 726 of this chapter.
[2] Paragraph 1066 of this chapter.
[3] Chapter 127, ¶ 521 et seq.
[4] Paragraph 745 of this chapter.
[5] Paragraph 1024 of this chapter.



## ILLINOIS REVISED STATUTES (1973)

**1021. § 409. Annual Privilege Tax Payable by Foreign or Alien Companies.** (1) Every foreign or alien company doing an insurance business in this State, except fraternal benefit societies, shall, for the privilege of doing business in this State by renewal of certificate of authority as provided in Section 114,[1] pay to the Director for the State treasury a State tax equal to 2 per cent of the net taxable premium income, together with any amounts due under Section 444.[2] The gross taxable premium income shall be the gross amount of premiums received on direct business during the preceding calendar year on contracts covering risks in this State, except premiums on annuities purchased for employees rendering services for non-profit educational or religious or charitable organizations and for employees who perform services for educational institutions and whose employer is the State, a political subdivision of the State or an agency or instrumentality of one of the foregoing, whether such premiums were in the form of money, notes, credits or any other substitute for money. The net taxable premium income shall be the gross taxable premium income reduced only by the following:

(a) the amount of premiums returned thereon which shall be limited to premiums returned during the preceding calendar year and shall not include the return of cash surrender values or death benefits on life policies;

(b) dividends on such direct business that have been paid in cash, applied in reduction of premiums or left to accumulate to the credit of policyholders or annuitants. In the case of life insurance, no deduction shall be made for the payment of deferred dividends paid in cash to policyholders on maturing policies; dividends left to accumulate to the credit of policyholders or annuitants shall be included as gross taxable premium income when such dividend accumulations are applied to purchase paid-up insurance or to shorten the endowment or premium paying period.

(2) There shall be deducted from the tax thus computed the amount, if any, paid during the preceding calendar year: (a) for the benefit of organized fire departments, to cities, villages, incorporated towns and fire protection districts of this State as a tax on premiums received by such company in such cities, villages, incorporated towns and fire protection districts, and (b) as a tax to this State or any subdivision thereof on or measured by net income, and the remainder shall be paid by such company as its annual privilege tax.

(3) If a company survives or was formed by a merger, consolidation, reorganization or reincorporation, the premiums received, and amounts returned or paid, by all foreign or alien companies parties to such merger, consolidation, reorganization or reincorporation, shall, for the purposes of determining the amount of the tax imposed by this section, be regarded as received, returned or paid by such surviving or new company.

Payments shall be due on an estimated basis for all of calendar year 1969 on or before September 1, 1969. Effective January 1, 1970, a company shall make an annual return for the preceding calendar year on or before March 1st setting forth such information on such forms as the Director may reasonably require. Payments of quarterly installments of the taxpayer's total estimated tax for the current calendar year shall be due on or before April 15th, June 15th, September 15th and December 15th, unless for the calendar year 1971, and each calendar year thereafter, insurers transacting insurance in this State whose annual tax for the preceding calendar year was less than $5,000, shall then make only an annual return. Failure of a company to make quarterly payments, if required, of at least one-fourth of either (a) the total tax paid during the previous calendar year or (b) 80% of the actual tax for the current calendar year shall subject it to the penalty provisions set forth in Section 412 of this Act.[3]

Amended by P.A. 77-2087, § 1, eff. Oct. 1, 1972; P.A. 78-255, § 61, eff. Oct. 1, 1973.

[1] Chapter 73, § 726.

[2] Chapter 73, § 1056.

[3] Chapter 73, § 1024.

# REPLY

# BRIEF

FILED
OCT 5 1984

No. 83-1274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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METROPOLITAN LIFE INSURANCE COMPANY, *et al.*,
*Appellants,*

v.

W. G. WARD, JR., *et al.*,
*Appellees.*

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**On Appeal from the Supreme Court of Alabama**

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## REPLY BRIEF FOR APPELLANTS

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W. G. WARD, JR., *et al.*,
*Appellees.*

---

**On Appeal from the Supreme Court of Alabama**

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## REPLY BRIEF FOR APPELLANTS

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Although the State of Alabama does not dispute that its domestic preference tax statute is grossly discriminatory against foreign insurance companies,[1] it nevertheless contends that the Equal Protection Clause does not

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[1] Neither the State nor the intervening Alabama domestic companies mention in their briefs that the disparity in tax rates between foreign and domestic companies in Alabama is as great as four to one. Appellees do not deny that the discrimination exists, however, nor do they suggest in any way that it is offset or ameliorated by other taxes. *Cf. Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535, 547-48 (1934).

For convenience, the brief filed on behalf of the Alabama Insurance Commissioner will be referred to herein as "State Brief at ——." The intervening Alabama domestic companies will be referred to as "Intervenors," and their brief will be cited as "Intervenors' Brief at ——." Pursuant to Rule 28.1, a listing of the corporate parents, subsidiaries and affiliates of the appellant companies appears in the Supplemental Appendix to the Jurisdictional Statement, with an update in footnote 1 of the Brief for Appellants.

limit its power to impose a higher tax on foreign companies, as a class, than on its own companies. The State relies for this contention upon a collection of disparate and inapposite authorities, none of which addresses the validity of domestic preference taxation under the Equal Protection Clause. At the same time, the State seeks, through a series of misinterpretations, fanciful distinctions and contrived theories, to minimize the impact of the unbroken line of cases, starting with *Southern Railway v. Greene*, 216 U.S. 400 (1910), holding that a state may not burden foreign companies as a class with taxes it is unwilling to impose upon its own companies.

The State's position appears to rest on two distinct rationales. First, the State contends that *Southern Railway* and its progeny,[2] although framed and decided on equal protection grounds, were actually Commerce Clause decisions in disguise. Since the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), has eliminated all Commerce Clause limitations on state taxation and regulation of insurance companies, the State argues that the *Southern Railway* line of cases is not controlling here. *E.g.*, State Brief at 26-30. As a fallback to its Commerce Clause theory, the State contends that, even if the *Southern Railway* line of cases did involve equal protection review of domestic preference taxation, those cases are inapplicable here because the justifications advanced for such taxation in this case either were not put forward, or were not considered, in the Court's earlier decisions. *E.g.*, State Brief at 34-36. Neither of these positions can be reconciled with the relevant decisions of this Court, however. The Court expressly rejected a McCarran Act theory similar to Alabama's in *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 655 n.6 (1981). Moreover, the Court faced a virtually identical equal protection argument in *Reserve Life*

[2] *See* Brief for Appellants at 8 n.8.



*Insurance Co. v. Bowers*, 380 U.S. 258 (1965), and held the challenged domestic preference tax invalid.

The conclusion is inescapable that the State is asking this Court to depart from settled equal protection doctrine, while overruling at least seven of its own decisions spanning nearly three-quarters of a century. At bottom, Alabama maintains that a state can overcome the manifest unfairness of subjecting all foreign companies as a group to potentially unlimited tax discrimination, simply by invoking a set of purposes which, taken in the abstract, appear to be constitutionally permissible goals for a state to pursue. The central legal issue under the Equal Protection Clause, however, is not whether the state can identify one or more permissible purposes that it might have had, but rather whether the state's purposes are *legitimate justifications* for the particular classification at issue. Measured by that standard, domestic preference taxation must fail.

## ARGUMENT

### I. NEITHER THE COMMERCE CLAUSE NOR THE McCARRAN ACT IS RELEVANT TO THE ISSUE PRESENTED HERE

#### A. The Equal Protection Clause Is a Fully Independent Constraint on State Legislative Action

The State advances the remarkable theory, nowhere mentioned by the courts below, that state legislation discriminating against foreign companies may be invalidated under the Equal Protection Clause only if such legislation is "illegitimate as violative of the Commerce Clause." State Brief at 9; *see also id.* at 26-30. This theory lacks any support in the decisions of this Court. Indeed, if adopted, it would make the application of the Equal Protection Clause to state taxation and regulation of out-of-state companies utterly redundant, since the protection of that Clause would be no greater than the

protection otherwise afforded by the Commerce Clause. This Court's decisions neither embrace nor permit any such result.

The seminal decision in this area is *Southern Railway v. Greene*, 216 U.S. 400 (1910). The State asserts that the Court's holding in *Southern Railway* "was premised upon the Commerce Clause concerns relevant to that case but which are, by mandate of Congress, conspicuously absent here." State Brief at 28. As support, the State refers to a footnote in the *Western & Southern* decision noting that the *Southern Railway* opinion relied on two Commerce Clause cases decided earlier the same Term. *Id.*, citing 451 U.S. at 662 n.14. As the Court correctly recognized in *Western & Southern*, however, *Southern Railway* relied on Commerce Clause decisions only to rebut the state's argument that the power to exclude foreign corporations from doing business in the state necessarily included the power to impose unconstitutional burdens on such corporations after they were admitted to the state. *See Southern Railway*, 216 U.S. at 413-14, 416; *cf. Western & Southern*, 451 U.S. at 662 n.14. On the substantive issue whether a foreign corporation can be subjected to "a new and additional franchise tax for the privilege of doing business within the State, which tax is not imposed upon domestic corporations doing business in the State of the same character," 216 U.S. at 412, the Court relied solely upon traditional equal protection analysis. *See id.* at 417.

Just as in this case, the State of Alabama in *Southern Railway* argued that its domestic preference classification was reasonable because of the State's conclusion that foreign companies should be treated differently than domestic ones. The Court rejected that contention, however. "It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to



do business in the State and [the] other for the right to be a corporation," the Court observed. "The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars." *Id.* at 417-18. The Court accordingly held the Alabama law to be a "denial of the equal protection of the laws." *Id.* at 418. Any contention that this decision was based on the Commerce Clause is obviously without substance.

That the Commerce Clause and Equal Protection Clause impose distinct and independent constraints on state taxation of foreign companies is made all the more evident in *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921), where the Court based its invalidation of a domestic preference tax on *alternative grounds*: the tax violated equal protection because it discriminated against nonresident companies, *id.* at 426, and it violated the Commerce Clause because it discriminated against the products of other states, *id.* at 427. Even more tellingly, in *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494 (1926), and *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535 (1934), the Court invalidated domestic preference taxes under the Equal Protection Clause notwithstanding the fact that the insurance company taxpayers in those cases were *not subject to the Commerce Clause*, because the business of insurance was not at that time deemed to be commerce. *Compare United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), *with New York Life Insurance Co. v. Deer Lodge County*, 231 U.S. 495 (1913). A similar result was reached in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), which was decided twenty years after Congress, in the McCarran Act, released the insurance business from all Com-

merce Clause restraints.[5] Neither of the other cases in the *Southern Railway* line relied in any way on Commerce Clause analysis. *See WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

In short, the State's theory that the legitimate state purpose test under the Equal Protection Clause is violated only when the asserted purpose contravenes an independent constitutional requirement simply fails to explain the long-established precedents of this Court. Moreover, the Court's most recent equal protection decision invalidating a state statute under the legitimate state purpose test underlines the point. In *Zobel v. Williams*, 457 U.S. 55 (1982), a case appellees fail to discuss or even mention, the Court held that the objective of "reward-[ing] citizens for past contributions" is not a legitimate state purpose for allocating benefits to citizens based on years of residence. *Id.* at 63. The Court nowhere intimated that this objective violated any constitutional norm outside the Fourteenth Amendment; rather its decision was premised exclusively on the ground that "'[t]*he Equal Protection Clause prohibits such an apportionment of state services.*'" *Id.* (emphasis in original), quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). Thus, it is apparent that, even in the absence of Commerce Clause limitations, the Equal Protection Clause constitutes an independent constraint that is fully adequate to the task of prohibiting the unfair and anachronistic practice of domestic preference taxation.

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[5] In fact, just as Alabama does in this case, the State of Ohio in *Reserve Life* invoked the aid of the McCarran Act, arguing that "Congress has recognized that in the area of insurance companies, the states have a vital concern in the taxation and regulation of insurance companies." Brief for Appellants, Appendix at 14a (quoting transcript of oral argument in *Reserve Life*). Obviously, the Court was not impressed with this point, since it reversed the lower court decision upholding the challenged tax.



### B. The McCarran Act Was Not Intended to Shield Domestic Preference Taxes From Equal Protection Review

The State's brief cites the McCarran Act a total of eighteen times, apparently seeking to derive a talismanic benefit from Congress' declaration that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011 (1982). The State does not, however, cite any language from the McCarran Act or its legislative history suggesting that Congress meant to give its blessing to domestic preference taxes. Rather, the State simply asserts, without authority, that the Act must have been intended to validate such taxes because "Congress could have had little else in mind when it passed the McCarran-Ferguson Act and thereby exempted taxation of the insurance business from the restrictions of the Commerce Clause." State Brief at 19 n.20.

The State's argument in this regard, and indeed its entire effort to rely upon the McCarran Act in this case, is flawed by a fundamental misunderstanding of the Act and its historical background. As this Court has frequently recognized, the primary purpose of the McCarran Act was to restore to the states the taxing and regulatory powers that they had possessed before the decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which first held the business of insurance to be subject to the Commerce Clause. *See, e.g., Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 655 n.6 (1981); *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 (1979). Such action was deemed necessary because, under then-existing Commerce Clause doctrine, the states were forbidden to impose *any* taxes—not merely discriminatory ones—on the privilege of a company to transact an exclusively interstate business. *See, e.g., Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90, 94 (1937), and cases cited. As a

result, had Congress not acted, the states might well have lost *all* authority to tax the interstate insurance industry.[4]

As this Court explained in *Western & Southern*, the legislative history of the McCarran Act makes clear that the statute had the limited objective of restoring the pre-*South-Eastern Underwriters* status quo. The House Report concluded, for example:

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court . . . .

H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945), *quoted in Western & Southern*, 451 U.S. at 655 n.6.[5] On this basis, the *Western & Southern* Court rejected outright

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[4] In fact, in the wake of *South-Eastern Underwriters*, many insurance companies refused to pay *any* state premium taxes, a fact of which the McCarran Act Congress was acutely aware. *See, e.g.*, S. Rep. No. 20, 79th Cong., 1st Sess. 2 (1945); 91 Cong. Rec. 1087 (1945).

[5] Of course, at the time the McCarran Act was enacted, this Court had already held state *domestic* preference taxes on foreign insurance companies invalid under the Equal Protection Clause. *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535, 545 (1934); *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494, 516 (1926). It cannot be presumed that Congress intended the McCarran Act to overrule those decisions. *See Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430 (1946); *see also State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 457 (1962) (Congress in McCarran Act did not purport to exercise any authority under the Fourteenth Amendment).



"appellee's argument that the McCarran-Ferguson Act altered constitutional standards other than those derived from the Commerce Clause." *Id.* That holding is dispositive of the State's McCarran Act argument in this case.

## II. UNDER TRADITIONAL EQUAL PROTECTION ANALYSIS, ALABAMA'S DOMESTIC PREFERENCE TAX IS INVALID AS A MATTER OF LAW

The second string to the State's bow is the assertion that domestic preference taxation conforms to the Equal Protection Clause because such taxation allegedly meets the test of being rationally related to a legitimate state purpose. Although the State acknowledges that the legislature of Alabama expressed no purpose other than the raising of revenue when it enacted the domestic preference tax statute, it contends that the statute must be upheld unless appellants can "negative every conceivable purpose which might support the statute." State Brief at 9. The State then argues that appellants have failed to rebut the seventeen assertedly legitimate state purposes put forward in the lower courts, as well as a newly conceived regulatory purpose argued for the first time in this Court. *See* State Brief at 11-15. Accordingly, the State concludes that its statute must be sustained.[6]

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[6] In making this argument, the State places great reliance on a supposed concession by appellants that if the State's counsel can conceive of a legitimate state purpose, it must be conclusively presumed that such purpose is rationally related to the distinction drawn in the domestic preference tax statute. *See, e.g.*, State Brief at 5, 44. This characterization of the so-called concession is inaccurate, however. As previously noted, *see* Brief for Appellants at 7, appellants waived their right to an *evidentiary* hearing on the rational relationship issue. Appellants thereby admittedly forfeited the right to contest the accuracy of the factual material proffered by the State and the Intervenors in support of their motions for summary judgment. Appellants did not, however, waive the question whether, as a matter of law, any particular asserted purpose bears such a relationship to domestic preference taxation that it can be said to constitute a legitimate or rational justification for that form of dis-

The State's analysis is deeply flawed. First, despite the State's best efforts to distinguish the *Southern Railway* line of cases, it is evident from those decisions that this Court has repeatedly and consistently invalidated domestic preference taxes under the Equal Protection Clause, notwithstanding the fact that the eighteen or so purposes proffered here by Alabama were equally "conceivable" in every one of those cases. Second, while the State has cited a string of unrelated precedents assertedly indicating that a state may favor domestic industries with respect to some matters, it has not cited a single case in which this Court has held a domestic preference tax valid where the Equal Protection Clause was applicable. Finally, and perhaps most importantly, the purposes and justifications put forward by the State in this case are in no way tailored to the subject to which the classification relates. The goals advanced here would equally well support *any* form of discrimination aimed at out-of-state companies. Yet this Court has never permitted the states to engage in wholesale efforts to disadvantage foreign corporations in their competition with domestic companies. Rather, as this Court held in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), in the area of taxation "the federal right of a nonresident 'is the right to equal treatment.'" *Id.* at 572, quoting

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crimination. Indeed, the joint motion and stipulation in the Supreme Court of Alabama, which was signed and agreed to by counsel for the State and the Intervenors, specifically acknowledged: (1) that the rational relationship issue is "a mixed question of law and fact," *see* Motion of the Commissioner to Dismiss or Affirm, Appendix at 2a; (2) that appellants were waiving only their "right to an evidentiary hearing on [that] issue," *id.* at 3a; and (3) that appellants were "reserv[ing] the right to present legal authorities and arguments with respect to both prongs of the two-part test in any appropriate forum," *id.* at 4a n.4. It is thus surprising that the State repeatedly contends in its brief to this Court that "it has been stipulated that Alabama's differential premium tax satisfies the second part of the two-step rational basis test prescribed by *Western & Southern*." State Brief at 5; *see also id.* at 9 n.7, 44.



*Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). The State's asserted purposes—all of which could be accomplished more directly through other means—afford this Court no reasoned basis for abandoning that fundamental principle of equity and fairness.

The State's principal ground for distinguishing this Court's past decisions is the assertion that those decisions failed to consider the kinds of purposes and justifications put forward in this case. This position is simply not supported by this Court's decisions on domestic preference taxation. The earliest case analyzing this issue under the Equal Protection Clause—*Southern Railway*—applied the then-current formulation of the rational basis test, inquiring whether the classification here "a reasonable and just relation to the things in respect to which such classification is made." 216 U.S. at 417. Under that test, the Court failed to uncover any reasonable basis for the distinction between domestic and foreign companies for tax purposes. *Id.* at 418. Similar results occurred in *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921), and *Honover Fire Insurance Co. v. Harding*, 272 U.S. 494 (1926).[9] In the subsequent case of *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535 (1934), which again considered the validity of the domestic preference tax held invalid in *Honover Fire*, the Court expressly stated that it was unable to perceive a "reasonable basis" for Illinois' tax discrimination against out-of-state insurance companies. *Id.* at 545.

This rule could not have developed, as the State suggests, merely because the Court was unaware of the po-

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[9] Although the State attempts to distinguish those cases, or cast doubt on their reasoning, *see* State Brief at 35-36, 45, any such doubt should be dispelled by this Court's description of those cases in *Stoumen v. Minnesota*, 283 U.S. 97 (1931), as "authorities which forbid a difference in the method of calculating the amount of the tax itself depending solely on the fact of residence within or without the State." *Id.* at 63 & n.10.

tential for differences between foreign and domestic insurers. The Court expressly recognized that potential in *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580 (1935), but held its significance to be limited. "[N]ot every legislative discrimination between foreign and domestic corporations is permissible merely because they differ," the Court commented. "The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made." *Id.* at 583.[9] Moreover, in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), the State of Ohio advanced precisely the same types of purposes and justifications for its domestic preference tax that Alabama puts forward here.[9] The Court rejected those arguments outright, reversing the decision below in a *per curiam* decision.

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[8] The *Metropolitan Casualty* Court observed, in particular, that "[i]t is not beyond the range of probability that foreign casualty companies, as distinguished from domestic companies, generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." *Id.* at 585. While these differences were acknowledged to be relevant for statute of limitations purposes, the Court carefully noted that they would not automatically support any form of discrimination a state might choose to adopt.

[9] Although a long list of asserted purposes appears in the State's brief, *see* State Brief at 12-15, the Intervenors correctly acknowledge that all of these purposes fall into two general categories: (1) "promoting the growth and development of the domestic insurance industry," and (2) "promot[ing] increased insurance coverage in . . . Alabama." Intervenors' Brief at 27. This same two-stage reasoning was employed by the State of Ohio in *Reserve Life*, where the state argued that the domestic preference tax "encourage[d] the location of insurance companies in Ohio," and thereby sought to provide other benefits to Ohio's citizens, such as promoting the reinvestment of premiums in the state. Jurisdictional Statement, Appendix at 35a-40a, reprinting Brief of Appellee, *Reserve Life Insurance Co. v. Bowers*, No. 96 (October Term, 1964).



The State suggests that the *Reserve Life* decision may not have reached the merits of the controversy, but may instead have simply sent the case back to the lower courts for further review.[10] This position cannot be sustained, however. First, contrary to the State's suggestion, *see* State Brief at 36, the Ohio Court of Appeals expressly upheld the challenged tax statute as one that, if discriminatory, did not contain "an improper or unlawful classification of taxpayers." *Reserve Life Insurance Co. v. Bowers*, 119 Ohio App. 251, 257, 196 N.E.2d 114, 118 (1963), *appeal dismissed*, 175 Ohio St. 468, 196 N.E.2d 87 (1964), *rev'd*, 380 U.S. 258 (1965). The effect of a reversal of that ruling is clear. Even more tellingly, this Court cited the *Reserve Life* decision in *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968), in support of the proposition that, once a state has permitted foreign corporations to enter its jurisdiction, " 'the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis.' " *Id.* at 119, quoting *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-72 (1949). Obviously, if the Court had not reached that issue in *Reserve Life*, it would have been improper to cite *Reserve Life* as authority on the question only three years later.[11]

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[10] The State appears to place considerable weight on the fact that the Court in *Reserve Life* not only reversed the judgment below, but remanded the case to the lower court. Given that the very same disposition was made in *every single one* of the cases in the *Southern Railway* line, it is difficult for appellants to perceive the significance of this point. The State attempts to distinguish or minimize *Reserve Life* on a number of other grounds, as well. *See* State Brief at 36-37. The untenability of these arguments has already been shown by appellants. *See* Brief for Appellants at 19-20.

[11] Although Intervenors attempt to distinguish the state court decisions relied upon by appellants, as well as the decisions of this Court, *see* Intervenors' Brief at 19-24, most of these purported distinctions contain the same flaws as the theories of the State dis-

Unable to evade altogether the precedential significance of *Southern Railway* and its progeny, the State seeks to string together a competing line of cases which it asserts can be read to support the validity of its effort to promote its domestic insurance companies through discriminatory taxation. Significantly, however, not one of these cases involved the constitutionality of a domestic preference tax under the Equal Protection Clause. By invoking these cases, the State not only misapplies their holdings, but also disregards the oft-stated principle that differences which may support one form of legislative classification do not necessarily support other forms of discrimination. *See, e.g., Western & Southern*, 451 U.S. at 668; *Metropolitan Casualty*, 294 U.S. at 583.

This is well illustrated in the case of *Board of Education v. Illinois*, 203 U.S. 553 (1906), a decision on which the State places great reliance. In sustaining an Illinois inheritance tax statute that included an exemption for bequests to domestic charitable corporations, the Court placed emphasis on two factors: (1) that the foreign charity which was denied the exemption had no office in Illinois and was required by Kentucky law to expend all of its funds in Kentucky, *id.* at 558, and (2) that the controversy in the case related solely to the power of the State over inheritances, *id* at 562. "[I]t cannot be said,"

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cussed in text. In one particular, however, Intervenors are simply in error in their reading of the cases. Contrary to Intervenors' contention, *see* Intervenors' Brief at 20, *Columbia Gas Transmission Corp. v. Commonwealth*, 468 Pa. 145, 360 A.2d 592 (1976), was not simply a state law decision; as the Supreme Court of Pennsylvania expressly noted in its subsequent decision in *Gilbert Associates, Inc. v. Commonwealth*, 498 Pa. 514, 518, 447 A.2d 944, 946 (1982), *Columbia Gas* relied on both the state and the federal constitutions. Similarly, Intervenors' contention that *Bullock v. Farmland Industries, Inc.*, 603 S.W.2d 305 (Tex. Civ. App. 1980), was decided on state constitutional grounds, *see* Intervenors' Brief at 20, is simply wrong. The holding in *Bullock* rested entirely on the *Southern Railway* line of decisions of this Court. *See* 603 S.W.2d at 307.



the *Board of Education* Court concluded, "that if a State exempts property bequeathed for charitable or educational purposes from taxation it is unreasonable or arbitrary to require the charity to be exercised or the education to be bestowed within her borders and for her people." *Id.* at 563.

The State reaches two false conclusions from this decision. First, it contends that if there is any arguable difference in the extent to which foreign and domestic insurance companies, as broad classes, bestow benefits on the state, then the state is free to tax the one and exempt the other. *Board of Education* stands for no such principle, however. In that case, the foreign charity was forbidden to provide *any* benefits in the taxing state. When, in a subsequent case, the Court was faced with discrimination against a foreign charity which was providing services in the taxing state, it had no difficulty distinguishing *Board of Education* and holding the domestic preference tax invalid. *WHYY, Inc. v. Glassboro*, 393 U.S. at 120.

Second, the State argues that *Board of Education* was premised in part on the greater difficulty a state may experience in regulating a foreign corporation, and that this factor supports the discrimination practiced by Alabama. State Brief at 15, 41. But the State's greater difficulty in regulating the foreign charitable corporation in *Board of Education* arose because the foreign charity was not subject to Illinois' jurisdiction *at all*. Naturally, when the state is regulating inheritances, where bequests may go to charities far removed from its jurisdiction, it must be concerned about its ability to determine whether the charity is properly entitled to an exemption. The same is by no means true of foreign insurance corporations. In order to do business in a particular state, a foreign insurer must be licensed, and must meet whatever reasonable regulatory conditions the state chooses to place on its license. *See New York Life Insurance Co. v.*

*Cravens*, 178 U.S. 389, 401 (1900) ("power of a State over foreign corporations is not less than the power of a State over domestic corporations"); *see also Robertson v. California*, 328 U.S. 440, 445 n.6 (1946) (upholding police power regulations directed at foreign insurance companies); *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 536, 544-45, 547 (1922) (same). If a state decides for its own reasons to regulate foreign companies in a manner that it deems insufficiently protective of local policyholders, it should not thereby be entitled to subject foreign insurers to unlimited tax discrimination.

Other cases cited by the State are equally inapplicable here. Although the State suggests that *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), involved a tax that "concededly discriminated against the out-of-state plaintiffs," State Brief at 19, the tax challenged there plainly was not a domestic preference tax. Rather, the legislative classification distinguished between those companies, regardless of their residence, that had eight or more employees, and those companies that had fewer than eight employees. *See* 301 U.S. at 505. Equally inapt is *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), which upheld a tax giving preference to *nonresidents*. Although Alabama suggests that the *Allied Stores* decision could be made relevant here if its holding were rewritten, *see* State Brief at 21, Alabama's domestic preference tax plainly cannot be upheld on the basis of *Allied Stores*, since Alabama's tax in no way "encourage[s] the construction or leasing and operation of warehouses [or the doing of insurance business] in [the state] by nonresidents." 358 U.S. at 529. Indeed, its effect is just the opposite.[12]

[12] The State asserts that appellants are relying on "Commerce Clause rhetoric" to distinguish *Allied Stores*. *See* State Brief at 22. As discussed above, however, appellants acknowledge that the Commerce Clause is inapplicable to this issue. The fundamental distinction between domestic preference taxation and the form of taxation upheld in *Allied Stores* relates not to whether commerce is burdened, but rather to whether the classification is fair and reasonable. In *Allied Stores*, no foreign company was subjected to a tax burden that the state was unwilling to make its own companies share. Similarly, in *Western & Southern*, where retaliatory taxation was upheld, no foreign company was ever made to pay a tax higher than the amount its own state had determined to be reasonable for foreign companies to pay. Here, by contrast, the class of companies having no representation in the state is singled out for tax burdens which the state does not apportion equally to its own companies, and which are potentially unlimited in amount. Given the nature of the equal protection guarantee, it is not surprising that the Court has considered such factors relevant for equal protection purposes. *See, e.g., Western & Southern*, 451 U.S. at 649-70 & n.23.



Finally, the State places great emphasis on a series of Commerce Clause decisions, none of them involving tax discrimination against foreign companies, in which the Court has endorsed the proposition that states have a legitimate interest in promoting domestic business activity and enhancing the profitability of domestic industries. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3056 (1984);[13] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970); *Parker v. Brown*, 317 U.S. 341, 363 (1943). The State argues that these decisions leave states free to promote the interests of domestic *companies* in any way they choose, so long as the Commerce Clause is not infringed. *See* State Brief at 24-26. The teaching of these decisions is much narrower, however. Properly understood, they merely establish that a state may undertake *neutral* actions—such as establishing a state agricultural

[13] The State's characterization of *Bacchus* as "a domestic preference tax case," *see* State Brief at 24, may give rise to a false impression. In *Bacchus*, the discrimination was between in-state and out-of-state *products*, not between in-state and out-of-state companies. The Hawaii Supreme Court, recognizing that distinction, correctly noted that the latter type of tax, if it discriminated against foreign companies, would violate equal protection. *See In re Bacchus Imports, Ltd.*, 65 Hawaii 566, 573-74, 656 P.2d 724, 729-30 (1982), *rev'd on other grounds sub nom. Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049 (1984).

proration program, *see Parker v. Brown*, 317 U.S. at 364-65, 367, or regulating packaging and labeling of agricultural products, *see Pike v. Bruce Church*, 397 U.S. at 143—which have the effect of making the state's products more desirable or more marketable. None of these cases contains the slightest indication that the state could deny the benefits of such a statutory program to a company engaging, within the state, in the business sought to be encouraged, merely because the company happened to reside in another state.

In the end, the State is reduced to arguing that its domestic preference tax should be sustained because the state legislature conceivably may have had good intentions when it passed the statute.[14] The State's good intentions are not the issue here, however. The issue is the inadequacy of the rationales put forward by the State as justifications for domestic preference taxation. An examination of the asserted purpose of encouraging investment in the state provides a useful example.

The State argues that the legislature could have been seeking to encourage investment by rewarding domestic companies for a presumed tendency to invest more of their assets in the state than foreign companies do. *See* State Brief at 14 (purpose 12). This justification, like the others proffered by appellees, suffers from two major flaws. First, its acceptance would open the door to unlimited discrimination, both in type and amount. If tax rate discrimination of four to one in favor of domestic companies is supposed to encourage companies to locate

[14] Ironically, the State disavows the most obvious and closely related purpose of domestic preference taxation, which is the raising of revenue from out-of-state companies. *See* State Brief at 18. At the same time, the State attempts to ascribe a revenue-raising purpose to retaliatory taxation, notwithstanding this Court's determination in *Western & Southern* that retaliatory taxation is not designed to produce revenue. *Compare* State Brief at 23 n.22 *with* 451 U.S. at 649.



in Alabama, and therefore to invest more in the state, then discrimination of twenty to one would presumably do an even better job.[15] Because this justification is in no way tied to the precise classification in respect of which it is offered, it would effectively remove all equal protection limits on discrimination against foreign companies. At the same time, this justification fails to treat similarly situated companies fairly. Domestic companies are rewarded regardless of their investments in the state. Foreign companies are penalized no matter how great their investments. Indeed, two companies with precisely the same aggregate amount invested in Alabama can pay radically different taxes based solely on place of residence.[16]

[15] Moreover, this goal could be advanced to justify placing unusual regulatory restraints on foreign companies, such as forbidding them to advertise to the same extent as domestic companies, or subjecting their agents to different highway safety laws. *Compare Smith v. Cahoon*, 283 U.S. 553, 567 (1931).

[16] The State argues, misleadingly, that domestic companies in Alabama are required to maintain all of their assets within the state. *See* State Brief at 40. In fact, the statute contains a very broad exception, under which a domestic company can deposit or transmit funds and assets to other jurisdictions "as reasonably and customarily required in the regular course of its business." Ala. Code § 27-27-29(d)(2) (1975). The State's own exhibits, sponsored by its expert witness, demonstrate that major Alabama insurers do not customarily maintain all of their assets in the state. In 1981, for example, the ten largest Alabama life insurers kept percentages of their total admitted assets in Alabama ranging from 13.11 percent to 70.59 percent, averaging 34.66 percent. *See* Exhibit 7 to Exhibit 1 to Second Affidavit of George A. Overstreet, Jr., Ph.D., Joint Appendix (J.A.) at 456. The average for the ten largest domestic property and casualty insurers was only 27.29 percent. *Id.* In fact, the State's own evidence shows that, in relation to the percentage of their business done in the state, the largest Alabama insurers in each category invested a measurably smaller percentage of their assets in Alabama than did the largest foreign insurers. *Id.*, J.A. at 449-50. While appellants do not rely on this evidence to bolster their argument, *see* note 6 *supra*, it does undercut any assertion by the State that investment in Alabama is somehow a unique attribute of domestic companies.

The other justifications offered by Alabama suffer from the same inherent flaws. None is limited in scope to justifying only the amount and type of discrimination challenged here, and none is tied to any characteristic which is unique or peculiar to the *class* of domestic or foreign companies. Rather, the State has chosen to make a broad classification on just that basis which raises the greatest potential for unfairness, namely, the segregation of those companies represented in the state and those deemed outsiders by the legislature.[17] This Court's decisions have long recognized that such a classification, for tax purposes, "does violence to the Federal Constitution." *Southern Railway*, 216 U.S. at 418. This case is an appropriate occasion for that fundamental principle to be reaffirmed, and for the inequitable system of domestic preference tax laws to be invalidated.

## CONCLUSION

For the reasons stated here and in the Brief for Appellants, the judgment of the Alabama Supreme Court should be reversed, and the case remanded for the determination of appropriate refunds.

Respectfully submitted,

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[17] Because appellants are challenging *only* tax discrimination against foreign companies, the State's assertion that appellants are seeking to impose uniformity on the states in the taxation of insurance companies, *see* State Brief at 47-49, is without substance. The states are free to tax in virtually any manner they see fit, so long as they do not discriminate against out-of-state companies.